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When Parents Aren't Enough: External Advocacy in Special Education

ABSTRACT. The Individuals with Disabilities Education Act (IDEA) has been widely celebrated for providing millions of disabled children with broader educational and life opportunities. This Note seeks to improve the implementation of the IDEA by questioning one of its key assumptions: that parents possess the tools to advocate for their children in special education matters. This Note argues that many parents need assistance to achieve optimal outcomes for their children because of the complexity of both the disabilities involved and the formal rules of the system itself. Several policy options are considered in the hope that local educational agencies will implement pilot programs to further explore the issue of external advocacy in special education.

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INTRODUCTION

Adam is in the tenth grade at a high school that *Newsweek* ranked in the nation's top two hundred.¹ For twenty years, the Department of Education has designated this school an "exemplary" high school. Since he was in the first grade, Adam has had an "individualized education program" (IEP), meaning that he is entitled to receive special education services under the Individuals with Disabilities Education Act (IDEA).² When he was born, Adam was diagnosed with cerebral palsy. Thanks to very dedicated parents, he received rigorous therapy and underwent multiple surgeries so that he is now able to walk normally. Nevertheless, he has difficulty with fine motor skills and especially struggles in his math classes. For example, Adam has a hard time lining up numbers when completing a math problem and he finds it difficult to write his answers clearly in the small blanks provided on worksheets and tests. His IEP entitles him to several modifications, including extra time on tests and enlarged text on assignments.

At the end of the first semester of his sophomore year, Adam went to school prepared for his math exam. The teacher failed to implement any of the modifications his IEP called for. Despite rigorous studying, Adam failed the test with a score of sixty percent.

Adam's mother is a guidance counselor at a local school and received her master's degree in education. She is well-versed in the procedural protections the IDEA affords Adam and takes advantage of them by attending all of Adam's IEP team meetings³ and requesting supplemental parent-teacher conferences to monitor his progress. Despite her efforts, Adam's mother cannot ensure that teachers will always provide his IEP modifications. Thankfully, she asked Adam detailed questions about the math test and realized what had happened. The next day she went to Adam's school and, after much discussion, convinced the teacher to readminister the test with the proper modifications. Upon retaking a different version of the two-hour exam, Adam earned a score of eighty-eight percent.

Adam's mother knew that she was entitled to request that the school correct its mistake because she works with students receiving special education under the IDEA on a daily basis in her capacity as a guidance counselor. Adam's mother did not receive any parental training upon Adam's placement

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1. Telephone Interview with Elizabeth Ryan, Guidance Counselor, Lynchburg City Pub. Sch. (Mar. 8, 2007).
 2. 20 U.S.C. §§ 1400-1482 (2000 & Supp. IV 2004).
 3. See *id.* § 1414(d)(1)(B).

in an IEP to inform her of her legal rights. Such training is not required under the law. The IDEA's procedural protections merely provide parents with a brochure and require schools to contact parents before an evaluation or when changes are made to a child's IEP. These safeguards often require an additional level of ability and knowledge: many documents detail the processes in dense, inaccessible language.⁴

Jeremy is a thirteen-year-old student in a large, urban school district.⁵ At the age of twelve, he remained in a third-grade classroom in a public school. His physical size made social interactions difficult. This discomfort led to discipline problems, resulting in fifty-three absences in one school year. Jeremy's mother realized that something was wrong, and she repeatedly asked the school to evaluate her son for learning disabilities. The school refused to comply, and Jeremy's mother was unaware that she had alternatives to force the school to act.

After five years of requests for an assessment, the school district finally evaluated Jeremy and diagnosed him with two disabilities, making him eligible for specialized services under the IDEA.⁶ Although the school's administrators did agree to perform the evaluation, they did not release the results of the evaluation for 142 days from the date Jeremy's mother gave her formal consent to the evaluation. This is significantly longer than the sixty day period that the IDEA allows for completion of evaluations.⁷ Jeremy's new IEP shows that his oral language skills are at a second-grade level and his basic reading skills at a third-grade level.

A five-year delay in evaluating a child for special education needs represents almost one-half of the time that child will spend in the public school system. In Jeremy's case, it appears that he was not learning at his full potential during the five years he spent without an IEP. He will face a monumental challenge

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4. Each state develops a notice of procedural protections for parents, and some states develop publications that almost guarantee incomprehension. For example, Virginia's notice spans forty-one pages and frequently employs acronyms unknown to the average parent. DIV. OF SPECIAL EDUC. & STUDENT SERVS., VA. DEP'T OF EDUC., YOUR FAMILY'S SPECIAL EDUCATION RIGHTS (2007), available at http://www.pen.k12.va.us/VDOE/Instruction/Sped/proc_safe.pdf.
 5. Sarah Carr, *MPS Slow To See Boy Needed Help, Family Says; Judge Hearing Case on Students with Disabilities*, MILWAUKEE J. SENTINEL, Dec. 4, 2005, at 1B.
 6. 20 U.S.C. § 1401(3)(A) (2000 & Supp. IV 2004).
 7. *Id.* § 1414(a)(1)(C)(i)(I) (requiring that the evaluation be completed "within 60 days of receiving parental consent for the evaluation"); see also *id.* § 1414(b)(4)(B) (describing procedures for the completion of an evaluation, including the requirement that "a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent").

attempting to catch up with his peers so that he is able to graduate from high school on time.

In principle, the IDEA gives every qualified child in the United States access to special education.⁸ As with many government-provided services, however, individuals often must take affirmative action in order to receive program benefits. Special education, whose consumers are children, presents unique challenges with regard to asserting one's rights. Children do not have the capacity to identify a disability or understand that their educational needs differ from those of their classmates. They must rely on parents or teachers to recognize their special needs and provide appropriate evaluation. As the IDEA is currently structured, children who are entitled to special education depend upon the school's provision of a "free appropriate public education" (FAPE),⁹ or, alternatively, their parents' willingness and ability to advocate for them.

Adam's story illustrates that, even in an exemplary school, it is often still necessary for someone effectively and assertively to advocate for a child in order to receive the full benefits of special education. Jeremy's story shows that in a school with more limited resources or professional expertise, well-intentioned parental advocacy is often not enough to prevent children from falling through the proverbial cracks. Because special education law today relies upon a system of procedural protections without detailed substantive requirements, schools can often make errors in judgment about the appropriate treatment plan for a disabled child. Such a formulation assigns parents to be the check on school systems, which is problematic in a system as complex and varied as special education.

This Note argues that, in the context of special education, neither teachers nor parents can act *independently* as effective representatives for children in the realm of special education. The right to an adequate education has long been an issue of great importance for policymakers in this country, in part because the effects of education policy reach almost every family at some point in time. In passing the IDEA, Congress recognized that public education should not exclude children with disabilities, and thereby extended the benefits of free public education to a class of children who, prior to the 1970s, had been drastically underserved.¹⁰ Congress also recognized that advances in special education have vastly improved the educational prospects of children with

8. As a condition of federal funding under the IDEA, states are required to engage in "child find" activities, which demand that all children with disabilities residing in a given jurisdiction be identified and evaluated, regardless of the severity of their disability. *Id.* § 1412(a)(3)(A).

9. *Id.* § 1400(d)(1)(A).

10. 20 U.S.C. §§ 1400-1482 (2000 & Supp. IV 2004).

disabilities.¹¹ Without effective advocacy, however, the promise of special education for children with disabilities cannot be realized.

The absolute necessity of successful special education programs is well-established. The successes of the disability rights movement over the past few decades have resulted in the normalization of the movement's goals: accommodation of difference, preparation for independent living, and the right to work and participate fully in the community.¹² For children with disabilities, full participation in the community is largely achieved through special education. In 1970, studies showed that nearly two million children with disabilities were excluded entirely from public education.¹³ Today, no state allows public schools to exclude children, and as of 2003, 6.63 million American students received specialized services under the IDEA.¹⁴ Many disability rights advocates emphasize the economic sensibility of special education programs by stressing that integration and quality education will always be less expensive over time than the forced dependency of disabled people.¹⁵

Despite enormous gains in the area of special education over the last few decades, there is still much room for improvement in utilizing special education programs to expand community participation and opportunities for individuals with disabilities. Evidence suggests that in some instances identification under the IDEA has not been sufficiently accurate. Despite similar incidences of dyslexia in males and females, for example, four times as many boys as girls are identified for special education.¹⁶ The blurry edges of

11. *Id.* § 1400(c)(5).

12. See RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 169-70, 178-79* (2d ed. 2001) (describing the goals and successes of the disability rights movement). The goals described here have been normalized through various legislation, including the IDEA and its subsequent reauthorizations, 20 U.S.C. §§ 1400-1482 (2000 & Supp. IV 2004); the Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2000); and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

13. CHILDREN'S DEFENSE FUND, *CHILDREN OUT OF SCHOOL IN AMERICA* 1 (1974).

14. THOMAS D. SNYDER, ALEXANDRIA G. TAN & CHARLENE M. HOFFMAN, U.S. DEP'T OF EDUC., *DIGEST OF EDUCATION STATISTICS 2005*, at 82 tbl.52 (2006), available at <http://nces.ed.gov/pub2006/zip/2006030.zip>.

15. FRED PELKA, *THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT* 113 (1997).

16. Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 341-42 & n.20 (1999) (citing Sally E. Shaywitz et al., *Prevalence of Reading Disability in Boys and Girls: Results of the Connecticut Longitudinal Study*, 264 JAMA 998, 1001 (1990)).

the definition of disability¹⁷ may enable problems of accuracy in the identification of students and the provision of special education. Nonetheless, enhanced representation and assistance for parents in their advocacy efforts would address these concerns of equity and accuracy in the provision of special education. This Note endeavors to address the failures of the special education system by proving that parents of students receiving special education are in dire need of external expert assistance.

Part I of the Note explores the history of special education initiatives since the 1970s. This discussion also includes a brief history of the role of parents in special education prior to the IDEA and of the ways in which that history motivated the formulation of parental participation in current federal special education laws.

Part II examines the current legislative landscape, focusing on the IDEA and its provisions. This discussion shows the heavy emphasis the IDEA places on parental advocacy. The IDEA requires, for example, that parents be notified and have the opportunity to participate whenever a school initiates an evaluation or changes the placement of their child. This Part argues that the current system of procedural safeguards lacks detailed substantive benchmarks and as such relies almost exclusively on parental advocacy to ensure procedural compliance.

Part III problematizes the assumption made by the IDEA that parents are well-equipped to act as a child's advocate in special education matters. This Part first discusses the need for special education advocacy by introducing several reasons why schools are sometimes unable to fulfill their obligations. For example, chronic federal underfunding and the local politics of school budgets limit the resources schools have to spend on special education, which often creates an incapacity to appropriately identify and serve all students with special needs. After demonstrating that schools may not always have the capacity to provide children with adequate services, this Part discusses parental advocacy and argues that special education represents an area of the law where parents, acting alone, are usually not the best child advocates. Parents often lack the necessary knowledge about disability and educational options, and often have difficulty interfacing with school officials in special education proceedings. These gaps in knowledge and ability make it difficult for parents to advocate effectively for their children without any external help.

17. *Id.* at 342 (citing Ted Miller, *Looking for Order: Health Promotion, Disability Prevention, and the Disability Classification System of the World Health Organization*, in *THE SECOND FIFTY YEARS: PROMOTING HEALTH AND PREVENTING DISABILITY* 311, 318 (Robert L. Berg & Joseph S. Cassells eds., 1990)).

Understanding the problems of parent advocates in special education leads into the Note's final Part, which proposes several policy options for external advocacy. These options should be viewed as a first step in increasing procedural protections for children receiving special education, and the various options will represent a range of policy choices that can be customized for individual school districts. Admittedly, there is little empirical evidence as to what type of program would be effective. This Note concludes that educational agencies or nonprofit organizations should fund pilot programs based on the various policy proposals presented here to determine what would work in various jurisdictions.

I. THE HISTORY OF SPECIAL EDUCATION INITIATIVES

Special education is, without question, a fundamental part of our modern educational system. Although there is persistent debate about the underlying theories of the IDEA, very few would advocate the abolition of special education altogether. It is useful for the purposes of this Note to examine the historical developments that led to the passage of the IDEA, the landmark special education legislation. Understanding the problems faced by children and their parents prior to the passage of the IDEA will illuminate the goals of the Act. This Part will also describe the importance of parental involvement in the special education process, which underscores the need to provide parents with extra help so that they are able to advocate effectively for their children.

Prior to the 1970s, special education was not on the political radar. The understanding of special education as a civil right for disabled people largely stemmed from the efforts of disability rights advocates who worked to change the conception of disability in the United States. Through the early 1970s, disability policy adhered to the medical model of disability "in which people with disabilities were presumed unable to function independently in the mainstream of social, economic, and political life."¹⁸ The disability rights movement worked to shift public conceptions away from a medical model of disability, which locates symptoms of a perceived illness within a person and focuses on how to treat those symptoms,¹⁹ toward a social model of disability, which "focuses on how existing social arrangements handicap individuals."²⁰ This shift in awareness confronted physical and social barriers built by a

18. SCOTCH, *supra* note 12, at 169.

19. DUANE F. STROMAN, *THE DISABILITY RIGHTS MOVEMENT: FROM DEINSTITUTIONALIZATION TO SELF-DETERMINATION* 4-5 (2003).

20. *Id.* at 15.

majority that perceived human deviation as defective.²¹ Therefore, facilitating full community participation of the disabled was a key objective of disability policy. Special education has become an essential tool in implementing the disability rights movement's objectives.

As this Note shows, parents have always been and should continue to be central to efforts to obtain equality for children with disabilities. Mobilization before the 1970s, however, was difficult because most parents and disability advocates worked through single-disability organizations.²² The medical model of disability policy prevented cross-disability mobilization because its goal was to allow disabled people to fit into existing social structures. Single-disability groups also feared that cooperative efforts might, for example, cause resources to be shifted away from their respective groups. This separation of advocacy efforts, along with the incredible diversity of anything that might be called a "disability community,"²³ impeded combined parental efforts to advocate for special education.

One of the most important factors in mobilizing disability rights and special education advocates was section 504 in the Rehabilitation Act of 1973, which prohibited any and all discrimination on the basis of disability within federally funded programs.²⁴ Although most members of Congress in 1973 did not expect section 504 to amount to anything more than a "platitude,"²⁵ the regulations developed by the Office of Civil Rights of the Department of Health, Education, and Welfare framed section 504 as a declaration of civil rights for disabled people.²⁶ Section 504 set the stage for a shift in the way society viewed disability, which in turn led to a broad push for social accommodation. This development contributed to a realization that public school systems should accommodate disabled students and was a factor in the evolution of modern special education.

21. *Id.* at 16 tbl.1.1.

22. *Id.* at 50-53 & tbl.2.2 (discussing the work of the National Association of the Deaf, the National Federation of the Blind, and the United Cerebral Palsy Association).

23. Legal definitions of disability encompass vastly diverse physical, mental, and emotional conditions, which for many years resulted in a lack of cohesion within the disability community. Due to the disparity among conditions labeled as "disability," people were traditionally reluctant to identify themselves with others who did not share their condition. See SCOTCH, *supra* note 12, at 6.

24. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794(a) (2000)); see also SCOTCH, *supra* note 12, at 52.

25. SCOTCH, *supra* note 12, at 54.

26. *Id.* at 63.

In 1975, Congress reported that more than fifty percent of the eight million “handicapped” children in the United States were not receiving adequate educational services and that nearly two million children were excluded from public education entirely.²⁷ This exclusion had existed since the inception of public schooling. Most disabled students were denied any educational opportunities or were educated in special facilities such as Thomas Hopkins Gallaudet’s American School for the Deaf in Hartford, founded in 1817, and the Perkins Institute and Massachusetts School for the Blind in Boston, founded in 1823.²⁸ By the 1960s, a larger number of disabled children were permitted to attend public schools, but they were placed in severely substandard academic programs. They were separated from the general student population in special education or “health conservation” classes, which were often located in basements or boiler rooms. School officials regarded special education as day care for disabled students.²⁹

The poor state of special education in this country became a particularly salient issue after the *Brown v. Board of Education* decision in 1954, which represented a “sea change in the legal approach to students that based on group characteristics faced separation or exclusion.”³⁰ Although the *Brown* Court’s holding did not affect special education directly, its statement of the importance of education is helpful in understanding the changes taking place in the second half of the twentieth century.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state

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27. S. REP. NO. 94-168, at 8 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1432; see also CHILDREN’S DEFENSE FUND, *supra* note 13, at 1 (“[N]early two million children . . . were not enrolled in school [in 1970].”).

28. SCOTCH, *supra* note 12, at 16.

29. PELKA, *supra* note 15, at 111.

30. Perry A Zirkel, *Does Brown v. Board of Education Play a Prominent Role in Special Education Law?*, 34 J.L. & EDUC. 255, 270 (2005).

has undertaken to provide it, is a right which must be made available to all on equal terms.³¹

Two landmark cases in the early 1970s, holding that exclusion policies illegally denied students with disabilities access to public education, bolstered the disability rights movement's efforts to improve special education programs. In 1971, the Pennsylvania Association for Retarded Children (PARC) and a group of thirteen parents of mentally retarded children brought a class action challenging a Pennsylvania statute that excluded retarded children from education and training in public schools.³² The lawsuit resulted in the approval of a consent agreement that mandated equality of access to education and emphasized a preference for mainstreamed education.³³ The consent agreement in *PARC* acknowledged that "mentally retarded persons are capable of benefiting from a program of education and training."³⁴

In 1972, the parents of seven students with disabilities in Washington, D.C., brought a similar lawsuit. In *Mills v. Board of Education*, the D.C. District Court held that the denial of public educational services to children with special needs violates the Due Process Clause.³⁵ In addition to declaring that all children, regardless of disability, were entitled to public education, the court also enunciated the rule that limited financial resources could not justify the denial of services to a disabled child.³⁶

The *Mills* and *PARC* decisions represented an assertion by federal courts that children with disabilities have the same rights to public education as do other children. These cases served as powerful tools for the special education movement. By 1975, lawyers had filed forty-six right-to-education cases in twenty-eight jurisdictions, basing their arguments on the *Mills* and *PARC*

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

32. *Pa. Ass'n for Retarded Children v. Pennsylvania (PARC)*, 334 F. Supp. 1257 (E.D. Pa. 1971). The primary Pennsylvania statutes challenged in *PARC* relieved the public schools from "the obligation of providing education or training" for children certified as "uneducable or untrainable." See *id.* at 1264.

33. *Id.* at 1257-58. Mainstreamed education refers to the inclusion of students receiving special education services in regular education classrooms rather than isolating them in special education classes. The IDEA shows a preference for mainstreamed education by requiring that students be placed in the "least restrictive environment" possible as part of their individualized education program. See 20 U.S.C. § 1412(a)(5) (2000).

34. *Id.* at 1259.

35. 348 F. Supp. 866, 875 (D.D.C. 1972).

36. *Id.* at 876.

precedents.³⁷ Moreover, it was these two landmark decisions that set the stage for Congress to recognize a disabled child's right to special education.

Shortly after the *Mills* decision, Congress passed the Education for All Handicapped Children Act (EAHCA) of 1975, which granted unprecedented educational rights to children with disabilities.³⁸ In 1990, Congress renamed the Act as the Individuals with Disabilities Education Act (IDEA),³⁹ although the substantive law remained the same. This legislation, which now provides 6.6 million students with specialized educational services,⁴⁰ is the legislative centerpiece of this Note and will be simultaneously celebrated and criticized. The IDEA requires state educational agencies to provide a free appropriate public education (FAPE) at public expense to all students.⁴¹ The implementation of the FAPE is based on principles such as the development of an individualized education program (IEP)⁴² and placement in the "least restrictive environment" (LRE).⁴³

In addition to creating the political impetus for federal legislation, *PARC* and *Mills* were important because they gave parents of disabled children the opportunity to participate in the educational decision-making process for the first time.⁴⁴ Prior to the development of special education laws, many parents begged for educational services for their children with special needs, only to be turned away because they lacked legal rights.⁴⁵ Unfortunately, even with enhanced rights under *PARC* and *Mills*, "many parents were still intimidated by school professionals or misinformed about school proposals for educating

37. H.R. REP. NO. 94-332, at 3 (1975); see also REED MARTIN, *EDUCATING HANDICAPPED CHILDREN: THE LEGAL MANDATE* 15 (1979) (stating that thirty-six lawsuits had been filed in twenty-seven jurisdictions by 1975).

38. Pub. L. No. 94-142, 89 Stat. 773.

39. Education of the Handicapped Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141-42 (renaming the EAHCA as the Individuals with Disabilities Education Act (IDEA)). Although the 1990 amendments changed the name of the Act, the substantive and procedural requirements remained largely the same. The name change signified a move away from the use of the term "handicapped."

40. SNYDER ET AL., *supra* note 14, at 81 tbl.50.

41. 20 U.S.C. § 1400(d)(1)(A) (2000 & Supp. IV 2004).

42. *Id.* § 1414(d).

43. *Id.* § 1412(a)(5). For a more complete discussion of these substantive requirements, see *infra* Part II.

44. Herr, *supra* note 16, at 350.

45. Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1042-44 (1972) (recounting how a parent unsuccessfully tried to obtain services for her son for two years).

their children.”⁴⁶ The ineffectiveness of parental advocacy under a regime of judicially imposed rights led Congress to believe that a statutory regime was necessary to ensure the provision of special education to disabled children. In its consideration of the EAHCA, Congress acknowledged that “[p]arents of handicapped children all too frequently are not able to advocate the rights of their children.”⁴⁷

Perhaps because Congress acknowledged the historical powerlessness of parents in the special education arena and parents were instrumental in spearheading the movement toward more widely available special education services,⁴⁸ the EAHCA (now the IDEA) created a cooperative relationship between parents and school districts.⁴⁹ Professor David Engel has argued that “[t]he choice to involve parents in the decisionmaking process reflects the drafters’ belief that the educational opportunities and rights of children with disabilities could best be protected by creating a new arena for controlled interaction between parents and educators.”⁵⁰

The integral role of parents in the IDEA is not surprising. Our legal and social systems recognize parents as the most effective representatives of their children’s general interests. Indeed, “[p]arents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances.”⁵¹ While states have a legitimate interest in regulating public education,⁵² ultimate control over the

46. Herr, *supra* note 16, at 350.

47. S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

48. Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 362 (1994) (“Such insistence on parental rights is hardly surprising in light of the fact that the prime impetus for reform came from parent groups.”).

49. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 167.

50. *Id.* at 170 (citing H.R. REP. NO. 94-664, at 43 (1975) (Conf. Rep.)). Part II explains the structure of the IDEA and the relationship between parents and school districts in further detail.

51. Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 647 (2002); *see also* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004); JEFFREY BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 157-59 (1982).

52. *Bd. of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring) (“[It] seems entirely appropriate that the State use ‘public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.’” (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979))).

education of children has traditionally remained with the family.⁵³ Parents, however, often delegate decision-making power about routine educational decisions to public schools in the interest of efficiency.⁵⁴ Nonetheless, they retain the right to intervene when the school makes a mistake or what the parent perceives to be an error in judgment.⁵⁵ As a very basic example of a parent's role as representative in a general education situation, consider the following: if a high school student requests to be placed in Advanced Placement has the capacity to do advanced work, but is placed in a general education track, it is expected that the student's parent will intervene. Given the presumptively continuous parent-child relationship, the parent has a more extensive knowledge of what curriculum the child is capable of taking, whereas the school is juggling the curriculum decisions of hundreds of students. Additionally, we assume that the intimacy and longevity of the parent-child relationship endows that parent with the motivation to intervene. The school is not likely to be as individually invested in this particular student and could let the mistake slip by unnoticed.

Given that parents are integral to a child's development due to their partiality and specific knowledge, we would expect that they should participate in some capacity in their child's educational experience. Professor Anne Alstott has written that "[t]oday, children must interact with a variety of large, impersonal institutions. The assumption that parents will faithfully represent their children's interests is ingrained in virtually all of our public institutions for children's care."⁵⁶ This expectation, however, does not change the fact that teachers and administrators remain the experts on education. Our system expects these educational experts to form a team with the parent, who fills the

53. Kotler, *supra* note 48, at 360-61 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish parents are not obligated to comply with compulsory education laws); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (holding that it is impermissible to ban instruction on foreign languages because such a law infringes on parents' decision-making authority); *Morrow v. Wood*, 35 Wis. 59, 66 (1874) (preserving the parent's "paramount right . . . to make a reasonable choice from the studies in the prescribed course which his child shall pursue"))).

54. See Engel, *supra* note 49, at 187.

55. Although parents are not required by the IDEA to correct schools' mistakes, they are the only party identified in the IDEA who has standing to challenge an agency's decisions about a child's evaluation or existing IEP. See 20 U.S.C. § 1415(f)(1) (2000 & Supp. IV 2004) (stating that parents have "an opportunity for an impartial due process hearing" when they have complaints about the provision of services by the school district). To further show that the statute envisions parents taking on such roles, see *id.* § 1415(b)(2), which requires the assignment of a parent surrogate for certain classes of children whose parents are unavailable.

56. ALSTOTT, *supra* note 51, at 18.

role of the child-specific expert.⁵⁷ Within this role, parents are a critical participant in any diagnostic stage of education. For example, when a parent first meets with a teacher, she can say that the child can tie her shoes but has trouble remembering her colors. The teacher then knows what areas to focus on. Additionally, parents can report on a child's progress in ways a teacher cannot. For example, if a child has historically excelled in reading but has struggled with multiplication, the parent is uniquely situated to provide a global understanding of the child's abilities. In this way, parents are essential in developing remedial programs.

This broad understanding of parents as important representatives of their child's interests, combined with the historical boxing out of parents in special education matters, motivated the IDEA to involve parents at every step of the process, from diagnosis to the development of an IEP. This Note argues that despite parents' essential role in the special education decision-making process, however, external advocates must supplement parents' efforts in order to achieve results in the best interest of the child.

II. A STATUTORY ANALYSIS OF CURRENT PROCEDURAL PROTECTIONS WITHIN THE IDEA

The central purpose of the IDEA is to provide disabled students with a free appropriate public education.⁵⁸ The EAHCA of 1975 provided a rather vague definition of a FAPE, requiring only that it be provided at public expense, utilize an IEP, and conform to state educational standards.⁵⁹ The Supreme Court's decision in *Rowley* further clarified that definition, explaining that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁶⁰ The *Rowley* decision was significant in that it limited the FAPE to require not optimal achievement, but simply the provision of "some form of specialized education."⁶¹ This limited

57. Buss, *supra* note 51, at 647.

58. 20 U.S.C. § 1400(d)(1)(A) (2000 & Supp. IV 2004).

59. Education of All Handicapped Children Act of 1975, Pub. L. 94-142, § 4(a)(18), 89 Stat. 773, 775. For further discussion on the statutory requirements of a FAPE, see MARY KONYA WEISHAAR, CASE STUDIES IN SPECIAL EDUCATION LAW: NO CHILD LEFT BEHIND ACT AND INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT 3-18 (2007).

60. Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

61. *Id.* at 195.

view of a FAPE broadened school districts' discretion to decide what specialized educational services to provide.

The IDEA now measures the appropriateness of a FAPE by considering a number of factors, the most important of which are the development of an IEP and placement in the least restrictive environment (LRE). The Act defines an IEP as "a written statement for each child with a disability" that describes a student's current level of achievement, measurable annual goals, any specialized services required to help meet those goals, and the type of educational environment in which the student will be placed.⁶² The Supreme Court has stated that each provision of a student's IEP must be accompanied by a probable benefit to that child, thereby trimming the number of services required by a FAPE.⁶³

An IEP is developed after an initial determination that a child has a disability and must be written cooperatively by a multidisciplinary team. This "IEP team" must include at least one regular education teacher of the child and one special education teacher or service provider who has worked with the child.⁶⁴ The team must also include a representative of the school district who is knowledgeable about the availability of special education resources.⁶⁵ The statute requires parents to be involved in this meeting,⁶⁶ but as will be discussed in Section III.B, parents often do not feel empowered to meaningfully participate in IEP team meetings. The IEP team must revise IEPs at least annually to determine whether or not the child's goals are being met.⁶⁷

Under the IDEA, the development of an IEP must include an affirmative statement describing the student's educational placement.⁶⁸ To further explain this requirement, the LRE mandate states that

[t]o the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled, and [separation] . . . occurs only when the nature or severity of the disability of a child is such that education in

62. 20 U.S.C. § 1414(d)(1)(A)(i) (2000 & Supp. IV 2004).

63. *Rowley*, 458 U.S. at 200-01. The Court in *Rowley* did not announce a test for evaluating whether a service or program provides an educational benefit to a child, but instead chose to analyze such benefits on a case-by-case basis. *Id.* at 202.

64. 20 U.S.C. § 1414(d)(1)(B) (2000 & Supp. IV 2004).

65. *Id.* § 1414(d)(1)(B)(iv).

66. *Id.* § 1414(d)(1)(B)(i).

67. *Id.* § 1414(d)(4)(A)(i).

68. *Id.* § 1414(d)(1)(A)(iv).

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁶⁹

It is interesting to note that some courts have ruled that the FAPE limits articulated by *Rowley* do not apply in the context of determining the LRE.⁷⁰ That is, while school districts are not required under *Rowley* to provide *all* services which might benefit a child, they cannot, under the LRE requirement, choose to place a student in an environment that is any more restrictive than necessary. Therefore, schools have less discretion in choosing where to place students with disabilities than they do in choosing which specialized services to provide. The Department of Education regulations currently require that school districts implement a “continuum of alternative placements” to be used when full-time placement in a regular education classroom is not feasible.⁷¹

As evidenced by the vague and malleable definitions of these substantive requirements, the IDEA is a unique statute with an “unconventional, decentralized system of decisionmaking.”⁷² Rather than detailing the specific services required under the Act,⁷³ the IDEA outlined “extensive procedural” protections for parents and students and relied heavily on those procedures to effect the Act’s purpose.⁷⁴ Congress may have chosen this unconventional method of legislating due to a federalism concern: since education has traditionally been the purview of states, Congress was concerned that any federal imposition of substantive requirements would severely limit states’ discretion over public education.⁷⁵ Another possible reason for the heavy reliance on procedure is that “the immense variety of disabilities and needs

69. *Id.* § 1412(a)(5).

70. Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL’Y 147, 150 (2001) (citing inter alia *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 n.7 (8th Cir. 1987)).

71. Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.115 (2007).

72. Engel, *supra* note 49, at 168.

73. *See id.* at 167.

74. Kelly D. Thomason, Note, *The Costs of a “Free” Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation Under the IDEA*, 57 DUKE L.J. 457, 464 (2007).

75. Engel, *supra* note 49, at 176 (citing E. LEVINE & E. WEXLER, P.L. 94-142: AN ACT OF CONGRESS 90-91 (1981); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, LAW & CONTEMP. PROBS., Winter 1985, at 63, 71; Note, *Enforcing the Right to an “Appropriate” Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1109 (1979)).

made it difficult to formulate universally applicable substantive standards.”⁷⁶ In the face of numerous physical, mental, and emotional disabilities, it would have been exceedingly difficult for Congress to create a “menu” of educational options to be provided for every disability category.

An additional factor motivating the use of procedural protections in the absence of substantive requirements was the recognition that schools have limited resources. The IDEA does not mandate that each student receive the best possible education,⁷⁷ but rather that disabled students have access to a FAPE with a focus on specialized services.⁷⁸

Given that the structure of the IDEA affords school districts significant discretion over the services they choose to provide, the Act provides students and their parents with various procedural safeguards.⁷⁹ The IDEA specifies in some detail the notice that schools must provide parents at each stage in the process so that the parents may decide if, when, and how to influence or challenge special education decisions.⁸⁰ The Act requires local education agencies to provide this notice in “easily understandable” language upon the initial referral for evaluation of the child, before each IEP meeting, and upon presentation of any complaint by the parent.⁸¹ In addition to the notice requirement, the Act stipulates two main procedural safeguards.

First, the educational agency must provide “an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . and to obtain an independent educational evaluation of the child.”⁸²

76. *Id.*

77. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 196-97 (1982) (suggesting that Congress’s use of “appropriate education” in the EAHCA required only the provision of “some form of specialized educational services” and not all services required to maximize the student’s educational potential).

78. 20 U.S.C. § 1400(d)(1)(A) (2000 & Supp. IV 2004).

79. See H.R. REP. NO. 104-614, at 5 (1996) (suggesting the importance of “very detailed” procedural safeguards to protect parents and children); S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (articulating the necessity to “provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children”).

80. 20 U.S.C. § 1415 (2000 & Supp. IV 2004).

81. *Id.* § 1415(d)(1)-(2).

82. *Id.* § 1415(b)(1).

Second, parents must have the opportunity to seek mediation, or to present complaints “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE].”⁸³ If a parent submits a complaint that complies with all notice and form requirements,⁸⁴ then a due process hearing will be scheduled.⁸⁵ Current Department of Education regulations require that any hearing must be conducted by an impartial hearing officer who is not employed by the local education agency involved in the hearing.⁸⁶ During a hearing, the statute permits parents to be represented by counsel, examine witnesses, and provide evidence.⁸⁷

The 2004 reauthorization of the IDEA stated that “the implementation of this title has been impeded by low expectations”⁸⁸ and that results could be improved through “strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.”⁸⁹ Although the amendments endeavored to strengthen procedural protections, some new provisions appear to limit those protections.

For example, the amendments appear to limit protections for parents by imposing a statute of limitations on complaints against school districts: once two years have passed since the decision in question, a parent loses her right to a due process hearing, except in cases involving fraud or misrepresentations by the school.⁹⁰ If a parent or other party chooses to appeal a hearing officer’s decision by filing an action in federal court, they now must do so within ninety days.⁹¹ Furthermore, Congress’s efforts to reduce the paperwork burden on school districts had the ancillary effect of limiting procedural protections: the 2004 amendments only require school officials to provide the procedural safeguards notice to parents once a year.⁹²

83. *Id.* § 1415(b)(5)-(6).

84. *Id.* § 1415(b)(7)(A).

85. *Id.* § 1415(f).

86. 34 C.F.R. § 300.511 (2007).

87. *Id.* § 300.512.

88. Pub. L. No. 108-446, § 601(c)(4), 118 Stat. 2647, 2649 (2004) (codified at 20 U.S.C. § 1400 (Supp. IV 2004)).

89. *Id.* § 601(c)(5)(B), 118 Stat. at 2649.

90. 20 U.S.C. § 1415(f)(3)(D) (2000 & Supp. IV 2004).

91. *Id.* § 1415(i)(2)(B).

92. *Id.* § 1415(d)(1)(A). Although school districts are generally only required to provide parents with the procedural safeguards notice once per year, the notice must also be made available

In addition to the IDEA, section 504 of the Rehabilitation Act of 1973⁹³ and the Americans with Disabilities Act (ADA)⁹⁴ provide additional legal rights for students receiving special education services. For example, because the ADA and the Rehabilitation Act are civil rights statutes as opposed to funding statutes, a student or his parent bringing an IDEA lawsuit against a school district can also allege violations of the ADA or section 504. In some cases, this is advantageous for the litigant as section 504 has a longer statute of limitations and, unlike the IDEA, provides money damages in most jurisdictions.⁹⁵ These statutes otherwise provide largely the same substantive rights as the IDEA,⁹⁶ although without the benefit of similar procedural protections.

In theory, the procedural protections offered by the IDEA and other federal legislation could adequately protect the rights of disabled students by relying on parents to act as a check on the school system. The IDEA imagines a team approach wherein the school and parents work together to devise the best plan of action.⁹⁷ If the school fails, the IDEA envisions that parents will intervene. However, the vague descriptions of a FAPE in the text of the legislation fail to

upon the initial referral or request for evaluation, anytime a complaint is filed, and upon the parent's request. *Id.*

93. 29 U.S.C. § 794(a) (2000) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").
94. 42 U.S.C. §§ 12101-12213 (2000).
95. See Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 WEST'S EDUC. L. REP. 629, 632 (2003); see also *Kilcullen v. N.Y. State Dep't of Labor*, 205 F.3d 77, 78 (2d Cir. 2000) (holding that Congress abrogated states' Eleventh Amendment immunity in the Rehabilitation Act, and plaintiffs bringing suit under section 504 can seek monetary damages); *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 982-83 (5th Cir. 1992) (approving the application of a two-year statute of limitations to section 504); *Andalusia City Bd. of Educ. v. Andress*, 916 F. Supp. 1179, 1184-85 (M.D. Ala. 1996) (holding that the statute of limitations to appeal a decision is thirty days under the IDEA and two years under section 504).
96. Although section 504 and the ADA may provide additional claims for litigants in special education cases, the IDEA remains the most important statute for students and parents. Unlike section 504 and the ADA, the IDEA specifically concerns special education and is therefore more useful and authoritative in the day to day coordination of special education services.
97. See, e.g., S. REP. NO. 105-17, at 19 (1997) ("The bill specifies that the determination of a child's eligibility is to be made by a qualified team of professionals and the child's parents.").

provide useful direction as to what services students are entitled to receive.⁹⁸ One helpful benchmark would be an educational “menu” of sorts for each child, or even for each type of disability. For instance, in the case of a child with autism, a useful substantive protection would be a mandate that schools must choose the most appropriate individualized program from a list of treatments, including applied behavior analysis (ABA),⁹⁹ floortime therapy,¹⁰⁰ occupational therapy,¹⁰¹ speech therapy, or the school-based TEACCH method (Treatment and Education of Autistic and Related Communication-Handicapped Children).¹⁰² As it stands, no such menu exists, and Part III will show that this omission often creates an insurmountable obstacle to advocacy for parents.

The lack of clarity in the substantive requirements of the Act and the obstacles faced by parents in challenging school decisions contribute to some of the criticism of the IDEA. A parent himself, Professor Marvin Kotler writes that

[a]mbiguity and disagreement regarding what constitutes a substantively “appropriate” program are commonplace. The formalistic procedures to protect parental rights have not served to level the playing fields between parents and educators. Procedural protections all too often have been reduced to mere empty ritual for all but the most educated and wealthy.¹⁰³

Moreover, states have difficulty providing parents with useful interpretations of FAPE and LRE requirements because parents who challenge IEP decisions usually do so within the confines of IEP team meetings. Very

98. While this Note does not challenge the validity of federalism concerns motivating Congress’s choice to leave discretion on substantive issues to the states, it does seem clear that the structure of the Act necessitates greater protection for parents than the simple provision of a notice of procedural safeguards.

99. See generally Alexis Ann Schoen, *What Potential Does the Applied Behavior Analysis Approach Have for the Treatment of Children and Youth with Autism?*, 30 J. INSTRUCTIONAL PSYCHOL. 125 (2003) (describing the features of ABA treatment models).

100. See Stanley I. Greenspan & Serena Wieder, *Climbing the Symbolic Ladder in the DIR Model Through Floor Time/Interactive Play*, 7 AUTISM 425, 427-29 (2003).

101. See generally Geraldine Dawson & Renee Watling, *Interventions to Facilitate Auditory, Visual, and Motor Integration in Autism: A Review of the Evidence*, 30 J. AUTISM & DEVELOPMENTAL DISORDERS 415, 416, 419 (2000).

102. See S. Panerai, L. Ferrante & M. Zingale, *Benefits of the Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) Programme as Compared with a Non-specific Approach*, 46 J. INTELL. DISABILITY RES. 318, 321-22 (2002).

103. Kotler, *supra* note 48, at 341.

rarely do parents request due process hearings,¹⁰⁴ and even more rarely do they bring lawsuits in federal district court. Therefore, precedent is not outlined in judicial opinions and schools and parents seeking to apply judicial interpretation of the IDEA in formulating an IEP cannot utilize prior decisions. The delegation of the development of substantive requirements to the states has simply not materialized in the way Congress imagined.

The most interesting question for this discussion is whether the team approach employed by the IDEA can be salvaged. The statute's use of procedural protections to facilitate parental involvement has not been as successful as Congress had hoped,¹⁰⁵ but this Note suggests that the addition of an external advocate could function to give parents "greater power to influence decisions"¹⁰⁶ and thereby give life to the system of procedural protections and minimal substantive requirements envisioned by the IDEA. The next Part discusses at greater length why the current procedural safeguards are often ineffective. In short, there are certain gaps in parental knowledge that impede effective advocacy. Schools have great discretion in forming IEPs for disabled children, and due to these gaps in knowledge, parents are unlikely to know when or how to challenge a school's discretionary decision.

III. DANGEROUS ASSUMPTIONS: WHY SCHOOLS AND PARENTS FAIL UNDER THE IDEA

A. IDEA Compliance Challenges Faced by Public Schools

The structure of the IDEA gives local educational agencies great latitude in designing the substance of special education programs for students with special needs. Because children do not often have the capacity to make recommendations about their own special education programs,¹⁰⁷ they must rely on parents or school officials to recognize their special needs and to provide appropriate evaluation and services.

¹⁰⁴. Kristen Rickey, *Special Education Due Process Hearings: Student Characteristics, Issues, and Decisions*, 14 J. DISABILITY POL'Y STUD. 46, 46 (2003).

¹⁰⁵. See Kotler, *supra* note 48, at 366.

¹⁰⁶. *Id.*

¹⁰⁷. The IDEA only allows a child to be a participant in IEP team meetings "whenever appropriate," giving schools wide discretion to include or exclude a child in these meetings. 34 C.F.R. § 300.321(a)(7) (2007). Transition service planning begins at age fourteen, and requires that one year before the student reaches the age of majority he or she is informed of IDEA rights. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc) (Supp. IV 2004).

In terms of education, courts have recognized that states have a legitimate interest in regulating public education and are therefore charged with the responsibility for providing public schools. However, Congress has repeatedly awarded final decision-making power on questions of education to parents.¹⁰⁸ Parents often delegate that decision-making power about routine educational decisions to public schools in the interest of efficiency.¹⁰⁹ In the realm of special education, however, sometimes schools fail to implement adequate special education programs for students, and parents are required to reclaim their decision-making authority.

This Section focuses on several reasons why schools are sometimes unable to fulfill their obligations to each and every student: inadequate funding, the individualization of the IDEA, and the burdensome paperwork requirements that the statute places on schools.

1. *Inadequate State and Federal Funding for Special Education*

Although the IDEA has created countless new opportunities for students with disabilities, the federal government has never provided adequate funding to states, and therefore special education demands often encroach on funds for general education.¹¹⁰ The IDEA states that the federal government will provide states with grants to assist in the provision of special education and that the maximum grant will be equal to the number of children receiving services multiplied by forty percent of the national average per pupil expenditure.¹¹¹ Congress has never provided the maximum grant; federal funding, on average, has been provided to states at fifteen percent of the per pupil expenditure.¹¹² Without sufficient federal funding, schools must rely on localities to provide funds. This reliance asks schools and special education advocates to confront the intense politics of local taxation: school boards that increase budgets are

108. See *supra* notes 52-53 and accompanying text.

109. See Engel, *supra* note 49, at 187 ("Few parents of children without disabilities would expect to meet with their child's teacher before the school year begins and to cooperate in the creation of an educational plan uniquely suited to their child's needs. Nor would most teachers welcome this degree of parental involvement."). For a more complete discussion of this balance of power, see *supra* notes 48-57 and accompanying text.

110. See Kelly Rozmus Barnes, *Special Education Finance: An Examination of the Impact of Compliance Requirements on Special Education Resources* (2004) (unpublished manuscript, on file with the Yale Law School Library), *microformed on* UMI No. 3149828 (UMI Microform Servs.).

111. 20 U.S.C. § 1411(a)(2)(A) (2000 & Supp. IV 2004).

112. Barnes, *supra* note 110, at 5-6.

essentially asking for higher property taxes. In general, homeowners are favorable to (modest) increases in property taxes for the purposes of improving local schools. Professor William Fischel has described this as the “homevoter hypothesis”: the quality of public schools is widely understood to have a causative relationship with property values, meaning that increased quality of public schools is believed to trigger increases in property values.¹¹³ Therefore, budget increases for regular education do not necessarily face intense opposition. Budget increases tied to special education, however, often confront significant political obstacles. For example, many parents of “regular education” children see special education budgets as encroaching upon the funds available to their own children and tend to oppose special education funding.¹¹⁴ Consequently, the “homevoter hypothesis” would not apply to increased budgets or appropriations for special education. For these reasons, combined with underwhelming federal funding, it is particularly difficult for schools to provide adequate special education services to all eligible students.

When schools cannot increase their budgets for special education, they are forced to perform a balancing act between providing services for students receiving special education services and those in the general student population. As discussed in Part II, the *Rowley* decision is most authoritative and comprehensive interpretation of a FAPE. In *Rowley*, the Court considered whether or not a school district was required under the IDEA to provide an interpreter for a deaf student. In a 6-3 decision, the Court ruled that the student did not need an interpreter in order to receive a FAPE. In so holding, the Court interpreted the IDEA as only requiring the provision of some services. This holding adopted the *Mills* view of special education: “*Mills* . . . speaks in terms of ‘adequate’ educational services . . . and sets a realistic standard of providing *some* educational services to each child when every need cannot be met.”¹¹⁵ The *Rowley* decision creates a frustrating interplay between limited resources and special education: the funding dilemma often makes it impossible for schools to comply with the IDEA and can discourage student

113. See generally WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001) (discussing the politics of local taxation in general and noting that homeowners are often willing to pay for the betterment of public schools). But see James M. Poterba, *Demographic Structure and the Political Economy of Public Education*, 16 J. POL’Y ANALYSIS & MGMT. 48 (1997) (stating that municipalities with large elderly populations are more hostile to property tax increases for the purpose of improving schools).

114. Hamilton Lankford & James Wyckoff, *The Allocation of Resources to Special Education and Regular Instruction*, in *HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION* 221, 228 (Helen F. Ladd ed., 1996).

115. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 193 n.15 (1982) (citations omitted).

evaluations and the implementation of expensive treatments. Without some outside advocacy by the child's representative, many school districts simply will not perform initial evaluations or subsequent revisions to ensure a child's IEP is effective. Part IV of this Note argues that an external advocate could prevent school districts from disadvantaging individual students as a result of tight budgets. Through zealous and individualized advocacy, an external advocate can prevent a school district from interpreting *Rowley* in a way that would not provide an individual student with a FAPE.

2. *The Difficulty of Implementing Highly Individualized Programs*

Another reason schools often find it challenging to comply with the IDEA is the highly individualized nature of the statute. The underlying theory suggests that "[s]ince each child is unique, and each child with disabilities has unique educational strengths and weaknesses, special education attempts to address and redress these strengths and weaknesses one child at a time."¹¹⁶ It can therefore be difficult for schools accurately to predict their annual expenditures on special education. A state's choice of education finance policy can further compound this difficulty. The predominant funding structure used for special education in the United States¹¹⁷ is the "Pupil Weight Model," which allocates funding by special education enrollment, type of disability, and type of placement.¹¹⁸ Inaccurate predictions lead to insufficient allocations of funding and thereby create another reason why schools are often unable to evaluate and provide services to students who exceed their original special education budget.

3. *Paperwork Burdens of the IDEA*

Finally, the IDEA has become quite burdensome for schools. In California, for example, there are seventy-two components to each child's individualized education program, and each reauthorization of the Act brings with it

¹¹⁶ Barnes, *supra* note 110, at 4. The individualized nature of the statute also leads to great variation in identification and treatment methods employed by various school districts. See Herr, *supra* note 16, at 341 ("Thousands of local public school systems, with only poorly articulated connections to other agencies that come into contact with children with learning disabilities, have widely variable policies and practices on their identification and placement.").

¹¹⁷ States have discretion as to which financing structure they use. For a full discussion of financing structures for special education, see Barnes, *supra* note 110.

¹¹⁸ *Id.* at 22.

additional requirements for compliance.¹¹⁹ One recent national study found that special education teachers spend an average of 4.7 hours per week on paperwork, while general education teachers only spend about 1.6 hours per week.¹²⁰ Given the fact that no state has ever fully complied with the requirements of the IDEA,¹²¹ the ever-increasing paperwork and manpower required for compliance creates another obstacle for schools and makes it less likely that school districts will be able to provide adequate specialized services to all eligible students.

B. Obstacles to Effective Parental Advocacy

Having established that schools, the entities primarily responsible for formulating IEPs for students,¹²² are often conflicted, the adequacy of services for disabled students turns on the efficacy of parents acting as students' representatives in the face of school failure.¹²³

The IDEA follows the general trend in American law of recognizing parents as the best advocates for their children.¹²⁴ As discussed in Part II, the IDEA contains multiple procedural safeguards requiring schools to notify parents and permit their participation at most stages of the process, including identification, evaluation, and development of an IEP. Additionally, the statute allows parents to request due process hearings in front of a neutral hearing

¹¹⁹ *Id.* at 36.

¹²⁰ Nancy Lee Jones & Richard N. Apling, *The Individuals with Disabilities Act*, in *INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES* 99-100 (Nancy Lee Jones, Richard N. Apling & David P. Smole eds., 2004).

¹²¹ Barnes, *supra* note 110, at 6. Although the IDEA represents the overarching federal special education law, each state provides its own requirements for special education programs either through legislation or regulation. State statutes or regulations are necessary in order to implement IDEA requirements within state-specific educational structures. In some cases, states may also choose to impose higher educational standards than the IDEA. In the case of California, however, the state legislature clearly stated that "nothing in this [statute] shall be construed to set a higher standard of educating individuals with exceptional needs than that established by Congress under the [IDEA]." CAL. EDUC. CODE § 56000 (West 2003).

¹²² 20 U.S.C. § 1400(c)(6) (2000 & Supp. IV 2004) ("[S]tates, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities . . .").

¹²³ See Stanley S. Herr, *Child Advocacy in Special Education*, in *WHO SPEAKS FOR THE CHILDREN? THE HANDBOOK OF INDIVIDUAL AND CLASS CHILD ADVOCACY* 147, 159 (Jack C. Westman ed., 1991) ("Recognizing advocacy functions as a major role of parenting, federal law vests parents with ongoing responsibilities for approving IEPs, authorizing evaluations, and challenging questionable special-education decisions.").

¹²⁴ See *supra* Part I.

officer if they feel the school is not providing a free and appropriate education for their child.¹²⁵ These procedural safeguards are the IDEA's main check on schools, to which the federal government delegates responsibility for interpreting the substantive requirements for special education. Without any rubric of success, the IDEA relies heavily on the parent-school team to produce just outcomes for students receiving special education services.¹²⁶ It is clear that the IDEA was formulated on the presumption that parents are both willing and able to perform these necessary functions.¹²⁷

While in many ways parents can act as valuable representatives for their children, there are three barriers to parental advocacy in the realm of special education. All of these barriers arise from the Act's unstated presumption that parents have sufficient knowledge to advocate effectively for their child. First, while parents may be better at identifying their child's strengths and weaknesses than school officials, parents are unlikely to be able to classify their child's abilities according to recognized diagnostic criteria for disabilities. Second, while parents may readily notice what is and is not working in an established remedial program, most parents do not have experience working within an educational system and are unaware of the educational options and services available to a disabled child in a public school. Third, parents must be able to interface with school officials and navigate the multiple procedural requirements of the IDEA in order to challenge a school's decision. In most

125. 20 U.S.C. § 1415(f)(1) (2000 & Supp. IV 2004).

126. The statute's emphasis on procedural protections for parents suggests that it envisioned the schools and parents to be in a cooperative relationship in the special education context and assumed that parents would take responsibility for challenging inappropriate or inadequate provision of services. See H.R. REP. NO. 104-614, at 5 (1996) (stressing the importance of "very detailed" procedural safeguards to protect parents and children); S. REP. NO. 94-168, at 8 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1432 (articulating the necessity to "provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children").

127. In addition to presuming that parents have the requisite knowledge to advocate for their children, the IDEA also assumes that parents are willing to make the extra effort to participate in the special education process. There are certainly families in which, for whatever reason, the parent will not be sufficiently motivated to fight for a FAPE for his child. This Note, however, focuses on those cases where the parent is willing, but simply unable, to advocate effectively. In the most extreme cases of abuse or neglect, a child will be assigned a parent surrogate. 20 U.S.C. § 1415(b)(2) (2000 & Supp. IV 2004). When a surrogate is involved, this Note's discussion about the necessity of supplemental advocacy will still apply. Pure parental unwillingness, however, would not be remedied by parental supplementation. In considering policy options, see *infra* Part IV, several ideas are suggested for implementing an ancillary parental supplantation program designed to serve children whose parents are unwilling to participate in the educational decision-making process.

cases, interacting with school officials requires parents to challenge someone with expert knowledge about education and to do so while maintaining relationships which will continue for the duration of the child's time in public school. In addition, the IDEA imposes extensive procedural requirements that can constitute a significant obstacle to effective advocacy.¹²⁸ For example, in Virginia a parent who wants an independent evaluation of his or her child must make a formal request to the school district. If the parent would like the independent evaluation to be done at public expense, she may have to appear at a due process hearing and present evidence proving that the child needs to be evaluated by a third party.¹²⁹

1. *Lack of Knowledge About Disability*

Although parents may be aware of the existence of common disabilities, it is unreasonable to assume that they have knowledge of the symptoms of these disabilities or can place their child's symptoms within a diagnostic category. For example, a parent might recognize that a child has more difficulty learning to read than his peers, but she probably will not be able to label that difficulty as a learning disability, autism, or attention deficit disorder. A parent might even attribute the child's difficulties with reading and other tasks to poor instruction in school or merely to slow learning. Without a diagnosis of some sort, a child cannot receive special education. Recall the earlier discussion of Jeremy's story: when neither schools nor parents identify a child as having a disability, he receives no targeted services at all.

It is important to note that in order to diagnose a child with a disability schools are required to employ "trained and knowledgeable personnel" to evaluate the child using a number of different tests.¹³⁰ Unless the parent is a professional who has worked with children with disabilities, it is unreasonable to expect her to recognize a specific disability through her own analysis. Because parents do not usually have the requisite knowledge to act as a proxy for schools when officials fail to identify a child as having special needs, the IDEA procedural safeguard of parent referral does not adequately meet its goal.

128. See Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1010 (1988) ("In addition to the psychological burdens of coping with a handicapped child, most parents lack the information and the resources to deal with the school bureaucracy. Both participation in the meetings and consent to the placement are usually formalities only.").

129. See DIV. OF SPECIAL EDUC. & STUDENT SERVS., *supra* note 4, at 7.

130. 34 C.F.R. § 300.304(c)(1)(iv) (2007).

In some cases, children will encounter another type of professional who should be able to diagnose a disability. For example, a child who has cerebral palsy will be diagnosed shortly after birth. Children with other physically-manifesting disabilities will likely be diagnosed in the course of pediatrician visits. Mental, emotional, and behavioral disabilities, however, may not be noticed during the provision of medical care. These are also the types of disabilities that are much more difficult for parents to recognize due to nonphysical manifestations.

2. *Lack of Knowledge of Educational Options*

Since the IDEA “envisions active parents responsible for approving IEPs, authorizing evaluations, and challenging questionable education decisions,”¹³¹ it is important to discuss the actual extent of the average parent’s understanding of the educational system. Most of our parenting skills are developed either through trial-and-error or personal experience. A blend of experience and instinct is in most situations enough to prepare a parent to act in his child’s best interest. Nonetheless, it seems counterintuitive to require parents to act as representatives for children in situations involving something as important and complex as special education without providing relevant training.

Education is a commonly shared experience, and most parents are able to draw on their own experiences to form expectations of teachers and school systems. However, special education involves complex, specialized services, with which few parents have any experience. For this reason, students receiving special education services bear the risk of being poorly served by their parents. Given that disability is a widely varying condition which each individual experiences uniquely, it is quite probable that a parent may not be the most appropriate advocate.¹³²

Since the passage of the IDEA, multiple scholars have argued that parents are often not fully aware of educational options available for their children and therefore have a difficult time forming accurate expectations of schools and teachers.¹³³ This lack of clarity about expectations is also symptomatic of many

131. Herr, *supra* note 16, at 366.

132. See *id.* at 374 (“Many parents lack the training or support to perform the role of child advocate, educational decision-maker, and program evaluator.” (citing Deborah A. Allen & Suzanne Stefanowski Hudd, *Are We Professionalizing Parents? Weighing the Benefits and Pitfalls*, 25 MENTAL RETARDATION 133 (1987))).

133. MILTON BUDOFF, ALAN ORENSTEIN & CAROL KERVICK, DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING 251-52 (1982); ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS,

parents' view that education is exclusively the domain of schools, and that educators are singularly capable of determining what a child needs in an educational environment.¹³⁴ For many parents, it is unclear what level of comprehension their child should be achieving at any point during a school year.¹³⁵ Such uncertainty contributes to the default assumptions that schools are doing their jobs and that interference is unnecessary. This barrier is very difficult to overcome for most parents because it requires them to realize the importance of their role as advocates for their children and as partners with the school in special education proceedings. Documented "educator resentment" of parental contribution to decisions about IEPs is an additional barrier faced by parents.¹³⁶ When confronted with officials who do not welcome parental contributions, parents must take the extra step of convincing the experts on education that they are qualified participants.

Compounding this gap in knowledge of educational options is the fact that the special education regime involves not only the text of the IDEA, but also federal regulations, state statutes and regulations, and judicial decisions.¹³⁷ Moreover, the notice provided to parents does not clearly illuminate the various substantive requirements for schools and the reasoning behind those policies. As noted in Part II, the IDEA does not provide an educational "menu" specifying what course of action should be taken for each child with each type of disability. Most parents do not understand why it might be disadvantageous to a child to be in a separate special education class for the entire day or that schools must follow disciplinary guidelines for children with IEPs. Therefore, although the IDEA offers certain procedural protections to parents in the form

RACE, AND FAMILY LIFE 198-99 (2003); William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, LAW & CONTEMP. PROBS., Winter 1985, at 7, 33; Engel, *supra* note 49, at 179.

134. See *infra* Subsection III.B.3.

135. Kotler, *supra* note 48, at 372-73 (discussing parental inability to judge or compare outcomes in educational programming).

136. *Id.* at 363 ("Educator resentment of parental participation in the process of selecting and implementing educational programming for disabled children is well documented." (citing Roland K. Yoshida et al., *Parental Involvement in the Special Education Pupil Planning Process: The School's Perspective*, 44 EXCEPTIONAL CHILDREN 531, 533 (1978))).

137. Herr, *supra* note 16, at 368-69 ("[Special education] advocates must . . . be fluent in the complex federal and state statutes, regulations, policies, and judicial opinions that support the student's entitlement to a FAPE and the remedies for any violations of the student's statutory and constitutional rights.").

of brochures and notifications about IEP meetings, parents are not well-equipped to deal with the substance of their child's educational needs.¹³⁸

Thus, the procedural safeguard allowing parents to participate in IEP team meetings and challenge IEP decisions is not very effective if parents are unaware of alternative options for educational programming. In the anecdote about Adam, it is clear that if his mother had not been aware that he was entitled to additional time on tests and that there was an option to retake the test after the initial oversight had been made, she might not have attempted to convince his teacher to give him the test for a second time.

3. *Difficulty in Interfacing with School Officials and Complying with Procedural Requirements*

Many parents have difficulty navigating the personal interactions and procedural requirements involved in challenging a school's special education determination. This gap in parental ability may stem from an inability to interface effectively with authority figures. As discussed briefly above, the current structure of public education encourages parents to defer on issues of special education, largely because parents who send their children to public schools¹³⁹ often delegate decision making on questions of curriculum, evaluation, and behavior to school officials.¹⁴⁰ This pattern of deference impedes parental participation in IEP meetings or due process hearings

138. See Engel, *supra* note 49, at 179 (describing the findings of a study which show that parents are usually unaware of "the extent of their children's substantive educational rights").

139. This Note has focused on problems of special education within public schools, because private schools often have more extensive funding and are better able to provide students with costly services. Nonetheless, many parents who send their children to private schools likely experience the same difficulty in obtaining sufficient knowledge to advocate for their children. The benefits of external advocacy discussed in Part IV of this Note would be equally applicable in private school contexts.

140. See, e.g., BUDOFF ET AL., *supra* note 133, at 251 (stating that hearing officers report that during due process hearings "parents, who are usually not experts in education, might perceive the opposing school as more powerful, more experienced with hearings, and more knowledgeable than themselves"); Herr, *supra* note 16, at 366 ("Unfortunately, parental participation is often limited because of excessive parental deference to professional educational judgment . . ."); Kotler, *supra* note 48, at 361 ("[T]he belief that educators have superior knowledge regarding programming, may lead to deference [by parents] to their decisions.").

because parents have not developed the requisite language to discuss educational programming with “expert” school personnel.¹⁴¹

Carol Vincent and Jane Martin conducted a study attempting to explain parental inability to interface effectively with school personnel. They describe two models of interaction with “expert systems” such as public schools: “The social democratic emphasis on the specialist knowledge of professional service deliverers created the public as *clients* . . . characterized by passivity [N]eoliberalism has sought to turn the public domain into a market in which the public exercise competitive *consumer* choice.”¹⁴² If the exercise of such consumer choice were not dependent upon the requisite linguistic abilities (i.e., the ability to understand educational jargon) and the capacity to navigate formal rules imposed by legislation and regulation at both the state and federal levels, parents would be much more effective advocates. Vincent and Martin go on to discuss varying parental interactions with public schools in terms of capital. They argue that “possession and deployment of material (i.e. goods and finances), social (networks and relationships), and cultural (knowledge and skills, social confidence) capital were vital in explaining variations in parents’ expression of voice.”¹⁴³ Parents who were effective advocates had much more knowledge about education in general and interfaced well with authority figures.¹⁴⁴ For parents who participated less in the educational process, many felt as if their intervention would not produce meaningful change, and some expressed the sentiment that parent-teacher conferences are “not for ‘people like us.’”¹⁴⁵ If the system now requires parents to make smart, consumer-like decisions, those without the requisite material, social, and cultural capital are at a marked disadvantage in their role as advocates for their children.¹⁴⁶

¹⁴¹. LAREAU, *supra* note 133, at 199; Engel, *supra* note 49, at 194 (“[Parents] are often less educated than other [participants] and are non-conversant in the technical language or concepts used during the meeting.”).

¹⁴². Carol Vincent & Jane Martin, *Class, Culture, and Agency: Researching Parental Voice*, 23 DISCOURSE 109, 110 (2002).

¹⁴³. *Id.* at 113.

¹⁴⁴. *Id.* at 115.

¹⁴⁵. *Id.* at 122.

¹⁴⁶. In another article, Carol Vincent writes:

There are common sense assumptions concerning the interrelationship between social class and parental agency: that an individual’s sense of agency and not just agency in regard to education, is heavily structured by social class; that opportunities for exercising agency are sought and taken up mostly by the professional middle-classes, secure in a sense of entitlement. These, then, are the people most capable of and most effective at challenging “expert systems.”

Carol Vincent, *Social Class and Parental Agency*, 16 J. EDUC. POL’Y 347, 348 (2001).

Professor David Engel analyzed a 1988-1989 study that found that parents feel inadequate and unqualified in special education situations across socioeconomic and other demographic classes.¹⁴⁷ He reported the following about parental participation in IEP meetings:

Most parents describe themselves as terrified and inarticulate. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decisionmaking as well as their feelings of vulnerability and disempowerment. . . . Often, but not always, parents feel that their own observations or requests are given little weight and that decisions are based primarily on the recommendations of the professionals. Their own close relationship with the child is viewed as a liability rather than as an asset—a liability that renders their judgments inherently suspect. Some committee chairpersons described with consternation the tendency of the majority of parents to stop attending the annual review meetings after the first few years. Non-attendance is predictable, however, in light of the stress, frustration, and anger expressed by parents in one interview after another.¹⁴⁸

The concept of “educator resentment” described in Subsection III.B.2 is another factor frustrating parental ability to interface effectively with school officials. Professor Engel reports that “[p]arents are inherently suspect because of their emotional attachment to the child, and [IEP team] members assume that parental preferences reflect subjective rather than objective judgments.”¹⁴⁹ A study by Professors William Clune and Mark Van Pelt revealed that this “educator resentment”¹⁵⁰ has led to “IEP conferences [that] frequently are highly formal, noninteractive, and replete with educational jargon.”¹⁵¹ Other studies have shown that, more often than not, school personnel make decisions about educational programming before IEP meetings, thereby preventing any meaningful parental input.¹⁵²

147. See Engel, *supra* note 49, at 168 n.6, 188.

148. *Id.* at 188-89.

149. *Id.* at 194.

150. Kotler, *supra* note 48, at 363.

151. Clune & Van Pelt, *supra* note 133, at 33.

152. Handler, *supra* note 128, at 1010 (“Parents are usually presented with staff recommendations, followed by ritualistic certification.”).

Over the last few years, the Supreme Court has heard several cases relating to parental involvement in IEP decisions and other special education proceedings. While the Court expanded parental rights in one case,¹⁵³ it restricted parents' ability to advocate for their children under the IDEA in two cases heard during the October 2005 Term.¹⁵⁴ In its decision in *Schaffer v. Weast*, the Court held that the burden of proof in an IDEA due process hearing initiated by parents seeking relief for their child is properly placed on the parents rather than the school district.¹⁵⁵ In what is already a complicated and difficult process, parents must now attempt to gather evidence to satisfy their burden of proof in an administrative hearing challenging an IEP. In her dissent in *Schaffer*, Justice Ginsburg recognized the almost insurmountable burden placed on parents by the Court, writing that "the school district is . . . in a far better position to demonstrate that it has fulfilled its [statutory obligation] than the disabled student's parents are in to show that the school district has failed to do so."¹⁵⁶ The second case the Court considered was *Arlington v. Murphy*, wherein the Court held that parents who prevail under an IDEA suit against a school district are not entitled to recover fees for services rendered by nonattorney experts.¹⁵⁷ This decision increased the already prohibitive costs of litigating a special education claim and will doubtlessly prevent many parents without extensive financial resources from filing complaints against school districts. The *Arlington* decision, when considered in conjunction with the Court's holding in *Schaffer*, which places the evidentiary burden on parents, "ignore[s] the realities of the litigation process and the characteristics of many

153. The parents of an autistic student sued a school district under the IDEA to challenge what they perceived to be inadequate provision of services in the student's IEP. The Sixth Circuit held that parents could not prosecute an IDEA claim *pro se* because they did not have standing and therefore could not proceed without representation. The Supreme Court reversed and held that parents were entitled to rights under the IDEA and therefore could prosecute IDEA claims. *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (abrogating *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998)).

154. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005). For a full discussion of the impact of *Arlington* and *Schaffer* on special education policy, see Thomason, *supra* note 74.

155. *Schaffer*, 546 U.S. at 62.

156. *Id.* at 64 (Ginsburg, J., dissenting) (citing *Weast v. Schaffer*, 377 F.3d 449, 457 (4th Cir. 2004) (Luttig, J., dissenting)); *see also* *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993); *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1188-89 (N.J. 1989).

157. *Arlington*, 126 S. Ct. at 2463.

special education parents by imposing unreasonable obstacles in the way of parents' attempts to exercise their due process rights."¹⁵⁸

Up to this point, this Note has focused on ensuring adequacy of special education services across the board. Distributional concerns facing consumers of special education are inextricably intertwined with broader adequacy considerations and must be considered in a discussion of parental advocacy. To that effect, it is important to note that the risk factors faced by many children with disabilities compound the problem of the three gaps discussed above. Some of these risk factors include poverty, greater likelihood of experiencing abuse, social isolation, and problems obtaining medical care. For example, twenty-eight percent of children with disabilities live in households with incomes below the poverty line, as opposed to only sixteen percent of nondisabled children.¹⁵⁹ Evidence suggests that during the 1980s and 1990s, the prevalence of disability in the United States increased, but only among families living below the poverty line.¹⁶⁰ With respect to child abuse, one "conservative" estimate suggested that disabled children are abused almost twice as often as nondisabled children.¹⁶¹ These risk factors suggest that parents of disabled students are much more likely to have difficulty advocating effectively for their children, perhaps because their impoverishment forces parents to work more jobs and spend more time outside the home, or because abusive parents may be less likely to have an interest in the child's success at school.¹⁶² Additionally, those families living below the poverty line on average have achieved lower levels of education than middle-class families. This socioeconomic reality enlarges the gaps in parents' knowledge and ability. To the extent that disability is more likely to occur in certain disadvantaged communities, parents in these communities may need additional support to effectively advocate for their child. Without some sort of low-cost or no-cost supplemental advocacy program, many of these parents will not have the

158. Thomason, *supra* note 74, at 476.

159. Susan L. Parish & Alison I. Whisnant, *Policies and Programs for Children and Youth with Disabilities*, in *SOCIAL POLICY FOR CHILDREN & FAMILIES: A RISK AND RESILIENCE PERSPECTIVE* 167, 170 (Jeffrey M. Jenson & Mark W. Fraser eds., 2006).

160. *Id.*

161. *Id.* at 171.

162. See BUDOFF ET AL., *supra* note 133, at 252 ("Hearing officers [at due process hearings] noted that . . . the parents bringing cases were mainly well educated, affluent, suburban parents. They felt that as urban parents were not able to afford representation; they were more easily intimidated by the requirements of a hearing and thus far less able to assert their rights under the law.").

financial resources to seek extra help, and children facing school failures will suffer as a result of ineffective advocacy.

It is a great disservice to children with special education needs to presume that their parents are adequately prepared to advocate for them and to represent their best interests when the schools do not. The United States has long considered education to be a social priority, and such an important social institution should receive heightened procedural protections. By passing such a broad statute as the IDEA, Congress seemed to recognize that the stakes surrounding education, and particularly special education, are extraordinarily high. Despite the fact that amendments to the IDEA have clearly admitted the statute's failures (albeit in vague language),¹⁶³ no steps toward providing supplemental advocacy have been taken.¹⁶⁴ Part IV suggests several possibilities for pilot programs that could help fill in gaps in parental knowledge and improve the quality of advocacy available to children.

IV. POLICY ALTERNATIVES TO SUPPLEMENT INADEQUATE PARENTAL ADVOCACY

Having established that the procedural protections laid out by the IDEA do not always offer a sufficient safeguard against school failure,¹⁶⁵ this Part explores the various forms that third-party assistance for parents might take.

A. Models of Policy Analysis: Parental Supplementation vs. Parental Supplantation

As a preliminary exercise, it is useful to consider external assistance at a conceptual level as either parental supplantation or parental supplementation. Parental supplantation involves a model where an external advocate would completely replace the parent in all special education proceedings such as IEP

¹⁶³ 20 U.S.C. § 1400(c)(4) (2000 & Supp. IV 2004) (“[T]he implementation of [the IDEA] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.”).

¹⁶⁴ This is true despite the fact that many scholars have recognized the need for such supplemental advocacy. See BUDOFF ET AL., *supra* note 133, at 251; Handler, *supra* note 128, at 1011; Herr, *supra* note 123, at 151; Herr, *supra* note 16, at 367-68.

¹⁶⁵ Herr, *supra* note 123, at 151 (“Even the most conscientious and zealous parents may need the aid and advice of a professional child advocate to claim the services due their child. . . . [P]arents often require access to professional advocates to help them understand their rights, to allow them to participate effectively in the Individualized Education Plan (IEP) process . . .”).

meetings and due process hearings. The supplantation would effectively give the student a parent “surrogate,” which the IDEA requires for students whose parents cannot be located by the state agency and for students who are wards of the state.¹⁶⁶ Parental supplementation, on the other hand, creates a cooperative relationship between the parent and the external advocate to work with the school on all special education matters. This Section uses the guardian ad litem system as an example of parental supplantation, and early childhood intervention programs and family intervention teams as examples of parental supplementation.

In most legal matters involving children, parents are the default representative for their child. Unless “it appears that the minor’s general representative has interests which may conflict with those of the person he is supposed to represent,” courts assume parents are competent representatives.¹⁶⁷ In Connecticut, as in the vast majority of U.S. jurisdictions, the legislature has declared a child’s parent to be his or her *de facto* guardian.¹⁶⁸

It is important to note, however, that the legal system does recognize certain situations wherein it is necessary to supplant parents and appoint a separate representative for a child. These situations usually involve matters where the judicial system is attempting to minimize a potential conflict of interest between parents and children.¹⁶⁹ An example of a type of representative used to supplant parents is a guardian ad litem, a guardian appointed to represent the interests of a child (or a person who is otherwise incapable of representing themselves) in a single litigation. A guardian ad litem does not act as an attorney, although in some cases a child’s attorney can also be his guardian ad litem. Trial courts are generally given broad discretion to determine whether or not a guardian ad litem should be appointed¹⁷⁰ and may appoint one *sua sponte*.¹⁷¹

Examples of situations where courts often supplant parents are custody proceedings,¹⁷² paternity determinations,¹⁷³ and divorce proceedings,¹⁷⁴

^{166.} See 20 U.S.C. § 1415(b)(2) (2000 & Supp. IV 2004).

^{167.} *Developmental Disabilities Advocacy Ctr. v. Melton*, 689 F.2d 281, 285 (1st Cir. 1982) (citing *Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 164 (5th Cir. Unit A Sept. 1981)).

^{168.} CONN. GEN. STAT. § 45a-606 (2007).

^{169.} *Shockley v. Okeke*, 882 A.2d 1244, 1248 (Conn. App. Ct. 2005) (stating that guardians ad litem are to be appointed if a parent’s interests are potentially incompatible with those of the child).

^{170.} *In re Tayquon H.*, 821 A.2d 796, 802 (Conn. App. Ct. 2003).

^{171.} *Shockley*, 882 A.2d at 1248.

^{172.} *G.S. v. T.S.*, 582 A.2d 467, 470 (Conn. App. Ct. 1990) (citing *Yontef v. Yontef*, 440 A.2d 899, 904 (Conn. 1981) (“[I]n the absence of strong countervailing considerations such as

proceedings involving the disbursement of a child's trust fund,¹⁷⁵ any instance where a child has an interest in an insurance policy or other benefit,¹⁷⁶ or any situation where conflict exists between a minor and a state agency.¹⁷⁷ Since 1974, the Child Abuse Prevention and Treatment Act (CAPTA) has conditioned the disbursement of CAPTA grants on the existence of a state law requiring the appointment of a guardian ad litem "in every case involving an abused or neglected child that results in a judicial proceeding."¹⁷⁸

In all of these cases, parental supplantation is required because there is the potential for the parent's interest to conflict directly with the child's. In these cases, as opposed to other contexts, discussed in Part I, parents are not able to represent their child in good faith. It is not a question of a parent not having the *capacity* to represent her child, but rather that the parent could potentially allow his or her interests to supersede those of the child. As another example, in situations involving money, such as a trust fund, there is the potential for self-dealing by parents, who may have selfish motives in making decisions regarding the child's economic livelihood. In terms of special education, however, the potential for self-dealing disappears because the parent is unlikely to benefit personally from the disbursement of benefits.

While the model of parental supplantation is useful as a third-party participation model, it is not particularly useful in the realm of special education. If parents are supplanted, the child will lose the benefit of those functions that *are* best served by a parent. Parents have unique knowledge of their children's needs and abilities, and they have the requisite motivation, presumably cultivated by the intimacy of the parent-child relationship, to advocate on their children's behalf. Therefore, while the model of parental supplantation might be useful in some aspects of a child's interaction with state institutions, it seems clear that parents with good intentions but imperfect

physical urgency or financial stringency, the better course is to appoint independent counsel whenever the issue of child custody is seriously contested.")).

173. UNIF. PARENTAGE ACT § 612(b), 9B U.L.A. 345 (2000) (requiring the appointment of a guardian ad litem in court proceedings determining a child's paternity). Some states have stated that a child's mother may not serve in this capacity. *See, e.g., Ernest P. v. Superior Court*, 168 Cal. Rptr. 438 (Ct. App. 1980).
174. *See, e.g., Ford v. Ford*, 216 N.W.2d 176 (Neb. 1974).
175. *See Tremaine v. Tremaine*, No. D.N. FA 86-0038193 S, 1991 Conn. Super. LEXIS 13 (Jan. 4, 1991); *Sarron v. Sarron*, 564 So. 2d 206 (Fla. Dist. Ct. App. 1990); *Waukesha County v. Tadych*, 541 N.W.2d 782 (Wis. Ct. App. 1995).
176. *See, e.g., Hock v. Lienco Cedar Prods.*, 634 P.2d 1174 (Mont. 1981); *Turner v. Turner*, 629 N.Y.S.2d 139 (N.Y. App. Div. 1995).
177. 1 DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 12:4, at 888 (rev. 2d ed. 2005).
178. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. III 2003).

knowledge and ability should not be entirely supplanted in the context of special education.

The conclusion that parental supplantation is not the best approach in the context of special education is based on the assumption that parents will be willing to contribute their time and efforts to achieve optimal educational outcomes for their children. Of course, this assumption does not always hold true. For example, since the IDEA requires schools to obtain a parent's informed consent before initiating an evaluation,¹⁷⁹ a parent who simply does not respond essentially prevents her child from receiving any specialized services at all. In the case of a parent who refuses to provide consent for an evaluation, or who does not respond to a request for consent, the school district may request a due process hearing to pursue the matter.¹⁸⁰ As discussed in Part III, however, the requirements to request a due process hearing can be tedious, and school districts will not be in violation of the IDEA's requirements if they fail to pursue their request in the absence of parental consent.¹⁸¹ In cases of parental unwillingness to participate, there is no question that children could benefit from an advocate outside parents and school districts. While supplantation would deprive children with participating parents of important benefits, this method would be well-suited, and even necessary, to assist children whose parents will not give them a voice.

As an alternative to parental supplantation, an advocate could supplement parents by working with them to fill gaps in knowledge and ability in order to provide the child with adequate representation. These cases generally do not involve conflicts of interest between a parent and a child, and as such they share more similarities with special education disputes than do cases involving guardians ad litem. Supplementation is a tool most often used to fill in gaps in parents' knowledge or in their ability to serve as advocates. Two useful models for this type of supplemental representation are state programs for infants and toddlers and intervention teams within child welfare programs.

Many states have programs targeting intervention for infants and toddlers with developmental delays in the hope of warding off any learning or other type of disability before the child reaches school-age. For many of the same reasons discussed in Part III, parents may not be well-equipped to identify and provide treatment for children with developmental delays. South Carolina, for

179. 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2000 & Supp. IV 2004).

180. *Id.* §§ 1414(a)(1)(D)(ii)(I), 1415(b)(6).

181. *Id.* § 1414(a)(1)(D)(ii)(III).

example, has a program called BabyNet,¹⁸² the purpose of which is to “provide early intervention services for all eligible infants and toddlers with disabilities and their families.”¹⁸³ Recognizing the great value of parental input in the evaluation and treatment of infants with developmental delays, the policy also requires the development of Individualized Family Service Plans, which “must be developed by a multidisciplinary team of appropriate qualified personnel which also must include the parent, guardian, or other adult responsible for the child.”¹⁸⁴ In this way, professionals with expertise in identifying and treating early childhood developmental problems supplement parents, and the gaps in knowledge are filled.

Another example of parental supplementation is Virginia’s system for intervention in troubled families under the Comprehensive Services Act.¹⁸⁵ This program operates outside the school system and devises behavioral plans and other remedial services in an effort to prevent the placement of children in foster care or another nonfamily placement. It utilizes a Family Assessment and Planning Team, which “[p]rovide[s] for family participation in all aspects of assessment, planning and implementation of services.”¹⁸⁶ Here, the value of parental inclusion in the process comes from both the parent’s input and the opportunity to train the parent so that he or she may implement the behavioral program devised by the team.

Similarly, it is essential for parents to participate closely in the evaluation and remediation process for students receiving special education services. Parents can act as advocates in ways that an external advocate or representative never could. Therefore, this Note will use the model of parental supplementation in considering potential programs.¹⁸⁷

182. See S.C. Dep’t of Health & Envtl. Control, Children with Special Health Care Needs: BabyNet, <http://www.scdhec.gov/health/mch/cshcn/programs/babynet/> (last visited Mar. 3, 2008).

183. S.C. CODE ANN. § 44-7-2540 (2002).

184. *Id.* § 44-7-2560.

185. Comprehensive Services Act for At-Risk Youth and Families, VA. CODE ANN. §§ 2.2-5200 to -5214 (2005 & 2007 Supp.).

186. *Id.* § 2.2-5208.

187. Again, this conclusion is based on the assumption that parents are willing to participate in special education decisions for their child. In cases where parents are unwilling to participate, parental supplementation would be ineffective. The following discussion of policy options will mention various ways in which proposals might be modified to serve children whose parents will not serve as their advocates.

B. Policy Proposals

In imagining a model for third-party assistance, this Note employs three important criteria: access, accountability, and funding. There are any number of ways to conceptualize each individual criterion, and any number of combinations that could result from considering the three together. The drastic demographic variations among school districts suggest that no single policy will be effective across the board, but by discussing the various components of a policy, it becomes possible to tailor a program to the specific needs of a school district.

As with all forms of policy analysis, multiple criteria are available to the critic. In the case of special education, however, access, accountability, and funding are the most relevant. Both access and accountability play into the concerns about the adequacy of special education. Thinking back to Jeremy's story, the major concern was that Jeremy was never evaluated and therefore was ineligible to receive special education services under the IDEA. If our concern is that school districts may not identify eligible children in a timely manner, then any program of supplemental advocacy must consider whether it can be effective in the face of a school's failure to evaluate. The access point, where an advocate begins to work with the parents and the school, will determine whether or not the advocate will be able to alleviate the problem of identification. In terms of accountability, a major concern discussed in Part III is that parents will not have the necessary knowledge or ability to challenge a school's decisions about a child's educational programming, and therefore the school is not held accountable in the way the IDEA imagined. If a supplemental advocacy program adds an external advocate to the parent-school team, there should be some accountability mechanism so that the shortcomings of an external advocate will not disadvantage a child. Finally, in the wake of a backlash from state governments and citizen groups against unfunded federal mandates,¹⁸⁸ no education policy, and specifically no special education policy¹⁸⁹ can neglect to discuss funding concerns while still claiming any type of legitimacy.

In considering how consumers would access external advocacy, the central question is: at what point in the process should parents and students receive an

¹⁸⁸ See, e.g., Sam Dillon, *Some School Districts Challenge Bush's Signature Education Law*, N.Y. TIMES, Jan. 2, 2004, at A1; William Yardley, *School Financing Is Focus of Lawsuit in Connecticut*, N.Y. TIMES, Nov. 23, 2005, at B6 (referring to a lawsuit filed by the Connecticut Attorney General which described the No Child Left Behind Act as an "unfunded mandate").

¹⁸⁹ See *supra* Part III.

external advocate? Such a determination is necessary to set the parameters of the program and to define who qualifies to use the service. As an illustration of access points, consider the model of a public defender's office. This model provides a logical access point: when you are charged with a crime, you are provided with representation. People do not have access to public defenders before they commit the crime and cannot therefore solicit legal advice at that point. The access point clearly defines the parameters of the service. The system of special education is not as clear-cut as the criminal justice system, with several viable access points to consider. One option would be to provide an advocate only when a parent, teacher, or other party has made a formal request that a child be evaluated. This approach would prevent the overprovision or abuse of the service, in that parents who do not have reason to believe that their child has a disability would not have access to this resource. It would not, however, address one of the major concerns discussed in Part III: parents are not always aware that they have a right to request an evaluation, and they are not always able to identify indications that an assessment would be useful.

Rather than using a child's identification as the access point for an external advocacy program, another option would be to provide space within the school where parents could go to request services. This approach would mimic a guidance counselor's office, which is available to any parent or student who wishes to use it. Parents could go to this office to discuss concerns about a child's academic performance and to receive neutral, expert advice as to whether or not they should affirmatively request an evaluation. This option, however, creates the possibility of overprovision or abuse of services. Unnecessary requests for representation could deplete limited resources. The establishment of a thirty-day trial period, during which advocates could meet with students and determine their need for supplemental advocacy, could stem any abuse of services.

Access points would also be a critical component of any policy designed to protect children whose parents are unwilling to participate. The only effective access point would be the point at which the parent's unwillingness becomes obvious to school officials, which in most cases would occur at the initial request for an evaluation. At this point, one option would be to institute a policy requiring the school district to request parental permission to refer the child to an external advocate. Parents who refuse to respond in the first instance, however, are similarly unlikely to sign a waiver. Any other method, such as sharing the names of non-participating parents with an external advocacy agency, would violate confidentiality requirements and frustrate parental rights. A more practical solution to this difficult problem seems to be legislative: states could enact legislation that goes beyond the requirements of

the IDEA. For example, states could *require* schools to request due process complaints in cases where parents fail to respond, or enact provisions for guardians ad litem to be appointed for children whose parents refuse to participate in decision-making about the child's education.

Second, structures of accountability are important to monitor the quality of services provided by an external advocacy program. An advocate providing unsatisfactory services does not benefit children and their parents or school districts. Any policy should implement mechanisms both to ensure that the advocates they hire are qualified and to replace advocates whose representation is substandard. The sponsor of an external advocacy program would have to decide who hires advocates and to whom the advocates are accountable. The most basic approach would be to allow the state to hire advocates or recruit volunteers who have existing expertise in special education, or who would receive specialized training in order to serve as effective advocates. In order to guarantee that the advocate acts only in the best interests of the child and maintains neutrality in disagreements between parents and school officials, a program should recruit people from professions with strong ethical guidelines, so that the person would feel more allegiance to professional standards than to any other pressures from the school or parents. For example, if a school district employed attorneys as external advocates, they would nonetheless be bound by some version of the Model Rules of Professional Conduct.¹⁹⁰ Neutrality, however, does not guarantee quality. A policy program could solve this problem by passing accountability directly to parents. For example, a program could allow parents to hire their own external advocate on a reimbursement basis. An even more attractive program, in terms of equality and accessibility, would be to provide parents with vouchers to hire advocates. These advocates would be entirely accountable to the parents, and if the parents were displeased with the advocate's performance, they could fire the person and request another voucher. To prevent consumers from requesting new vouchers when advocates, in good faith, do not achieve the desired results, a program could require a parent to show cause for the termination of the advocate.

If a policy were enacted where schools hired advocates directly, it would be important to create a mechanism for consumers, meaning parents and students, to complain if the advocate does not do a good job. This could take the form of an ad hoc committee to review complaints whenever necessary,

190. MODEL RULES OF PROF'L CONDUCT (2007). Although the rules themselves are not binding, forty-seven states have adopted some version of the Model Rules of Professional Conduct and made them binding upon lawyers practicing in those states. See Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Model Rules of Professional Conduct: Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Apr. 22, 2008).

although the neutrality of the committee, or lack thereof, might still be cause for concern.

Yet another option would be to create space within the school for a nonprofit organization to serve as external advocates for students. This approach would ensure neutrality from the school district, but the limited financial and human resources of nonprofit organizations might pose a challenge. Advocates provided by a nonprofit organization could also be held accountable by an ad hoc committee to which consumers could make complaints. Depending on the funding of such a program, it is conceivable that if a nonprofit organization employed advocates who provided low quality services, funding could be transferred to a more competent organization.

Accountability in a parental supplantation program for children without participating parents presents a more difficult problem. Since parents are not available to hold advocates accountable, the burden falls to the school. There is a potential conflict of interest here, since an advocate's substandard representation may stem from the fact that he inappropriately deferred to a school's decision. A monitoring committee could also be used here, but it would serve a different function. The group could, for example, audit cases of parental supplantation to ensure the quality of the advocacy. Advocates who are underperforming could be replaced, and such auditing would impose sufficient pressure to encourage higher quality work.

Third, funding constitutes the largest obstacle for a program providing external advocacy for special education. Possible funding options are federal or state government, or nongovernmental organizations offering grants to groups proposing special education initiatives. If a policy were implemented as an amendment to the IDEA, the federal government could allocate additional funding to external advocacy programs, while allowing agencies (either at the state or local level) to determine which elements of the policy proposals presented here would be most effective in their schools. The biggest concern with reliance on funding through the IDEA is the government's poor track record of compliance with statutory funding requirements. An alternative to requesting that funds be added to the general congressional appropriation for the IDEA would be to rely on program-specific grants provided by the federal government. The 2004 reauthorization of and amendments to the IDEA gave the Secretary of Education the authority to award specific grants to "parent training and information centers," which are defined as private nonprofit organizations providing information and various services to parents of disabled

children.¹⁹¹ These grants are completely separate from the formula grants provided to states and local education agencies under the IDEA. The Secretary of Education oversees these discretionary grants and is required to provide at least one grant to a parent training and information center in each state.¹⁹² Such a parent information center could conceivably provide direct advocacy services to parent consumers.

Alternatively, a supplemental advocacy program could rely on each state to raise the requisite funds. As discussed in Part III, financial and political limitations make it difficult to request that states allocate any further funds to special education. If one or two localities ran particularly effective pilot programs which proved that external advocacy increases outcomes and decreases the costs imposed by late identification and misidentification of children with special needs, the idea of state funding might be realistic.

Finally, the option of applying for grants from nongovernmental organizations represents another option to procure funding. Many large organizations provide grants to groups who propose initiatives in areas of interest to the organization. For example, in 2006 the Chicago Bar Association provided a grant to a nonprofit called Equip for Equality to fund their Special Education Advocacy Project, which provided "help-line advice and referral services, training materials and legal representation to families on critical special education issues."¹⁹³ Although there are significant financial constraints on organizations providing these grants, seeking funding in this way would eliminate the political obstacles inherent in any request for governmental funding.

Funding for new education programs is inevitably a concern for policy proposals. In the context of disability, proponents of supplemental advocacy programs such as those described here can improve the political viability of their proposals by emphasizing the long-term benefits of effective advocacy. Over time, such programs likely would *save* money by minimizing the costs of misidentification and giving teachers the tools efficiently and effectively to help students with special needs.

191. Pub. L. No. 108-446, § 671(a), 118 Stat. 2647, 2788 (2004) (codified at 20 U.S.C. §§ 1400, 1471 (Supp. IV 2004)). For specific information about applying for these grants, see U.S. Dep't of Educ., Parental Information and Resource Centers, <http://www.ed.gov/programs/pirc/index.html> (last visited Mar. 3, 2008). See also Alison Kepner, *Center for Parents Gets Grant To Expand*, NEWS J. (Wilmington, Del.), Sept. 2, 2007, at 2B.

192. § 671(e)(1)(A), 118 Stat. at 2790.

193. Dina Merrell, *The Chicago Bar Foundation: The Community's Foundation for Access to Justice: A Sound Investment Strategy: CBF Announces New Grants for Fiscal Year 2006*, 20 CBA REC. 28, 30 (2006).

There are numerous models that could be conceived from the discussion of access, accountability, and funding. This Note examines three possible programs and the advantages and drawbacks of each. As with the decision to choose finite criteria for this analysis, I recognize that there are multiple other programs that could be conceived in considering a program of supplemental advocacy for special education. Nonetheless, this Note focuses on three proposals that employ the criteria differently, and one that has been implemented successfully in the past. Also, within each proposal, components could be changed or modified to incorporate any of the above-discussed approaches to access, accountability, and funding.

1. Policy 1: “Public Defender” Model of Full-Time Advocates

The first proposal draws from the model of a public defender’s office.¹⁹⁴ The Sixth Amendment of the Constitution has long been interpreted to require the provision of counsel to criminal defendants who cannot afford a lawyer.¹⁹⁵ It has become the norm for states to maintain a public defender’s office with full-time attorneys who represent indigent criminal defendants. A similar model could be applied to special education. Each district could appoint a special advocate to every child being evaluated for special education services, and to those already receiving services. This advocate would be a full-time employee paid by the state and would have pre-existing expertise in the area of special education. An ad hoc committee, which would accept complaints from students and parents receiving services, could act as an accountability mechanism to guarantee high quality advocacy.

A full-time advocate could be recruited from a number of different fields. One could imagine that the following people might be effective advocates: attorneys trained in education law,¹⁹⁶ retired or former professionals in the education field, psychologists specializing in learning or other disabilities,

194. In some states, public defenders are private practitioners paid by the state to take individual cases. See, e.g., WIS. STAT. ANN. § 977.08(3)(f) (West 2007) (“The state public defender shall enter into as many annual contracts as possible . . . with private local attorneys or law firms for the provision of legal representation.”). The concept here, however, envisions an office of full-time employees dedicated to representing defendants unable or unwilling to provide their own defense.

195. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

196. Herr, *supra* note 16, at 367 (“Legal representation can help parents negotiate a more favorable IEP or win a contested hearing. Lawyers can use their knowledge to achieve a legally required outcome that is more beneficial to the child.”).

literacy professionals, or psychoeducational consultants.¹⁹⁷ A supplemental advocacy program could also enhance the advocates' preexisting expertise by requiring that they complete a training course on special education advocacy. A number of nonprofit organizations, such as the Federation for Children with Special Needs,¹⁹⁸ the Council of Parent Advocates and Attorneys,¹⁹⁹ and the Special Needs Advocacy Network²⁰⁰ currently offer such training.

Additionally, a simple Google search reveals that there is currently a large market for private advocates who assist parents in IEP team meetings and other special education matters.²⁰¹ The state could recruit these individuals to provide a public service, similar to pro bono services, or their services could be employed within the private sector through the use of a voucher program.

The advocate would consult with the parent to determine if the child's current IEP is acceptable and could arrange and attend IEP team meetings to propose changes and work with the school. In this way, the child would receive the benefit of his parent's unique knowledge and the expertise of a third-party advocate. Such a system would overcome the three gaps in parental knowledge discussed in Part III (lack of knowledge regarding disabilities, educational options, and difficulty interfacing with school authorities).

Implementing this proposal would require policymakers to overcome some potential drawbacks. For example, the utilization of the child's evaluation as an access point to the program does not address the concern that parents do not always make affirmative requests for evaluation when their children need it. Additionally, this model would be by far the most expensive of the policies this Note proposes. To give a rough idea of the funding requirements of this program, consider the following calculations: in the United States, approximately fourteen percent of students receive some form of special education services.²⁰² Even if each advocate could work with fifty students, such a system would still require about one advocate per five hundred students. In a school district with five thousand students, the district would

197. Herr, *supra* note 123, at 151 ("Even the most conscientious and zealous parents may need the aid and advice of a professional child advocate to claim the services due their child.").

198. Federation for Children with Special Needs, Parent Training and Information, <http://fcsn.org/pti/index.php> (last visited Apr. 8, 2008).

199. Council of Parent Advocates and Attorneys, About COPAA (2007), <http://www.copaa.org/about/index.html>.

200. Special Needs Advocacy Network, About Us (2002), <http://www.spanmass.org/AboutUs.html>.

201. See Google, <http://www.google.com> (last visited Feb. 7, 2008) (search for "special education advocates").

202. SNYDER ET AL., *supra* note 14, at 81 tbl.50.

have to employ about ten special education advocates.²⁰³ Without discussing what salary a school district might pay such an advocate, it remains clear that the cost might be prohibitive.

2. *Policy 2: Recruiting and Training Community Volunteers*

As an alternative, school districts could adopt the above policy, but could utilize community volunteers rather than full-time employees. This model has proven effective in procuring guardians ad litem for children in the judicial system. Such nonprofits as Court Appointed Special Advocates (CASA) train volunteers and coordinate their participation with the judicial system.²⁰⁴ A well-known example of this type of system is the appointment of private attorneys to pro bono cases. In both civil and criminal courts, judges are often given a list of attorneys willing to take pro bono cases of litigants unable to pay for an attorney on their own. In this way, the state does not assume the cost of a salary but is still able to provide benefits to those in need.²⁰⁵

A program utilizing community volunteers as special education advocates was implemented quite successfully in Madison, Wisconsin, in the 1980s.²⁰⁶ When a child was identified for evaluation, parents were provided with an easy-to-read handbook about the special education process, including

203. As an alternative, each school district could employ one external advocate to serve all of its special education students. Such a program would not be desirable, however, because it is doubtful that such an advocate would be effective if he were carrying the caseload for an entire school district.

204. See CASA, <http://www.nationalcasa.org> (last visited Mar. 3, 2008).

205. A serious question with any volunteer program involves the incentives for community members to volunteer. What might motivate an attorney or a retired teacher to participate? In order to have a full staff, states would certainly have to make an effort to inform the community of the problems that exist within special education (limited funding, scarcity of teachers, etc.) and explain the ways in which they affect disabled children. In order to get volunteer commitment, however, the community must prioritize the problem. Such prioritization could perhaps be achieved by recruiting community members to form a task force on special education. Once a group of people independent of the state valorizes the issue, the larger community is more likely to care. An interesting strategy would be to recruit people for the task force from those groups of professionals who might be targeted as potential volunteer advocates. In this way, those people with the requisite knowledge and experience would become invested in the issue and would be more likely to volunteer (and to encourage colleagues to volunteer). Aside from investing the issue of special education with high priority, the state could provide volunteers with any number of incentives, such as a small stipend, community events celebrating their work, publicity, etc.

206. JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 83-119 (1986).

procedural safeguards for parents and explanations of their substantive and procedural rights, and encouraged to use a parent advocate. This handbook also listed community advocates (mostly nonlawyers) willing to assist parents during IEP meetings with school personnel and other special education proceedings. This model not only reduced the school-imposed barriers to parental participation by actually encouraging and facilitating participation, but also it recognized the gaps in parental ability and knowledge described in Part III. Professor Handler studied the program in the Madison Metropolitan School District and reported that the ideology behind the Madison program viewed parents as a central part of the special education process. As such, the relationships between parents and school officials were much more productive, and therefore more conducive to a continuous relationship.²⁰⁷ Another interesting aspect of the Madison program was its approach to an access point. In the 1980s, every child who entered the public school system was screened for possible disability or special needs.²⁰⁸ Although this level of commitment to special education screening is perhaps not optimal for every school district, it could reduce the time many students spend struggling through their classes until an observant teacher refers them for evaluation.

In the model that this Note envisions, community volunteers could conceivably interact with families in the same way that full-time advocates could. The aggregate time commitment for each volunteer would necessarily be smaller to accommodate their other commitments, but recruitment of a larger number of advocates could counterbalance the part-time commitment.

Accountability would be a serious concern with any type of volunteer program, since there would be no automatic incentive such as a salary.²⁰⁹ It would be particularly useful here to shift control to parents and allow them to request a new advocate if the one assigned to them performs inadequately. This is a modification of the voucher program discussed earlier, which involves paid advocates not employed directly by the schools. In this case, the voucher would represent the right to use a volunteer's services, rather than a voucher which represents a school's agreement to pay an advocate directly.

207. *Id.* at 92-93.

208. *Id.* at 85.

209. The program in Madison, Wisconsin, studied by Professor Joel Handler found great parent satisfaction with community volunteers serving as supplemental advocates. HANDLER, *supra* note 206, at 88-90. If the pool of community volunteers consists largely of parents and educators who have firsthand experience with education, Handler suggests that their commitment to the parents they are serving will be guaranteed by the passion they have for adequacy and excellence in the provision of special education services. *Id.* at 92-94.

Funding considerations suggest that a volunteer program would be much more politically feasible than a program employing full-time paid advocates. A federal “parent information center” grant, or a local bar association grant, could provide funds for training and administration of such a program. Additionally, the involvement of community members could contribute to social consciousness within the community regarding the existing inadequacies of special education.

3. *Policy 3: Parent Advocacy Centers*

As a final proposal, states could sponsor the development of parent advocacy centers as an alternative to providing advocates to parents. Many nonprofit parent advocacy centers are already in place around the country.²¹⁰ The purpose of a parent advocacy center is to provide training and support for parents of disabled students to prepare them to advocate for their child in PPT meetings, due process hearings, and other interactions with the school.²¹¹ Proponents of parent advocacy centers argue that, in most cases, it is important to empower the parent by giving her the tools to advocate for her child on her own. Nonetheless, most concede that in the more complicated cases, including cases that involve language or cultural barriers, it is very helpful to have an expert accompany the parent to IEP team meetings.

The main drawback of a parent advocacy center involves the complexity of disability and the special education system. Many of the professionals this Note has discussed as potential supplemental advocates have had years of training and experience interacting with special education issues. It is doubtful that parents will be prepared to advocate effectively for their child after two or three training sessions. Although the centers could conceivably offer a more comprehensive training program, the vast majority of parents are already juggling family and work responsibilities and will not have time for evening or weekend training sessions. For that very reason, the state could not make such a training program mandatory, and many children would still be faced with parents who, despite their best intentions, cannot effectively advocate for their interests.

Nonetheless, the element of empowerment is incredibly important and parent trainings would be a useful addition to any special advocate program

210. See, e.g., Connecticut Parent Advocacy Center (CPAC), <http://www.cpacinc.org> (last visited Feb. 7, 2008).

211. Interview with Nancy Prescott, Executive Dir., CPAC, in New Haven, Conn. (Mar. 8, 2007).

instituted by the state or a private entity. Due to the complexity and dynamic nature of disability and special education, however, it would be improper to rely on parents to obtain training on their own time. The end result of such an expectation would be inconsistent parental representation, which does not solve the problems that this Note identifies.

Each of these three proposals juggles ideas about access, accountability, and funding. Nonetheless, each of the three embodies the spirit of the IDEA. The IDEA envisions parents and schools acting as a team to provide services to disabled children. The school is charged with informing and including the parent in all major decisions about the child's receipt of special education services. The parent, in turn, is charged with correcting the school when it fails or makes a mistake. However, the IDEA presumes great knowledge and ability on the part of the parent, and that knowledge is not guaranteed, for all the reasons discussed in Part III. This Note proposes the addition of a third member of the team: an objective party with expertise about special education and public school systems who can advocate for the child in a way most parents cannot, and who does not face the financial and resource constraints of the school. An external advocate fills the gap left by the IDEA's team formulation. Unless that gap is filled somehow, children like Jeremy and Adam will continue to struggle with the public school system. Such an arrangement is unacceptable and will continue to be inequitable unless parents receive some help.

CONCLUSION

At its core, this Note is about helping parents help their children. A plethora of literature discusses social policies to help parents with childcare, early development, regular education, and health care. Many of these policies, such as the Head Start early child development programs, have been implemented with great success. This shows beyond a doubt that feasible social policies that assist families reap broad benefits for society at large.

Parents with disabled children face even greater challenges than do other parents. Despite their best efforts, they do not naturally have the knowledge required to advocate for their child in some institutional interactions. The team-based approach suggested by this Note utilizes the parent's unique knowledge of her child, the school's area expertise, and the external advocate's objective analysis in an attempt to serve the interests of the child.

There is no systematic evidence supporting or criticizing the idea of external advocacy for special education. We simply do not know what works and what does not. Given the serious issues presented in this Note, however, it would be worthwhile to fund pilot programs aimed at addressing the issues of

inadequate parental advocacy and special education. School districts could pick and choose from the various options suggested in terms of access, accountability, and funding. While a voucher system with a concrete access point might be best for some localities, a full-time employee program with thirty-day trial periods available to any student might be more effective in another school district. The discussion here is meant to serve as a starting point; by identifying a weakness within the special education system we can now begin to determine how best to address that weakness. Also, by focusing the implementation of supplemental advocacy programs at the local level, it is possible to avoid the federalism concerns that might arise if the federal government were to impose additional requirements on states and localities through the IDEA.

In any case, only with some form of assistance to parents can the IDEA achieve its stated goals and carry out its system of reliance on procedural protections.